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ANNUAL REPORT

of the Judge Advocate General to the Minister of National Defence
on the administration of military justice in the Canadian Forces

A REVIEW FROM 1 APRIL 2009 TO 31 MARCH 2010



OFFICE OF THE JUDGE ADVOCATE GENERAL
CABINET DU JUGE-AVOCAT GÉNÉRAL

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Dear Minister,

It is my honour to present to you the eleventh Annual Report of the Judge Advocate General on the Administration of Military Justice in the Canadian Forces, made pursuant to section 9.3 of the *National Defence Act*. This report covers the period 1 April 2009 to 31 March 2010.

Yours truly,

Blaise Cathcart
Brigadier General
Judge Advocate General

Canada

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JUDGE ADVOCATE GENERAL COMMUNIQUÉ

Ten years ago, the *National Defence Act* (NDA)¹ received a comprehensive legislative overhaul in the form of Bill C-25.² These amendments represented the most significant changes to the military justice system since the enactment of the NDA in 1950. When the Bill received Royal Assent on 1 September 1999, it updated many aspects of the military justice system, reaffirmed that system's compliance with the *Canadian Charter of Rights and Freedoms*, and strengthened the unique legal characteristics at the heart of Canada's modern and disciplined armed forces.

Despite the positive change that resulted from Bill C-25, it remains clear that reform of the military justice system is not a one-time event, but rather a continuing process of improvement and refinement. Since military law forms part of the broader and ever-changing Canadian legal framework, we must all work to ensure that the system continues to reflect the deeply held and constitutionally-protected Canadian values of fairness, transparency and the rule of law.

It has long been established that military forces require an efficient and effective mechanism to address disciplinary issues within their ranks in order to successfully carry out their assigned missions. Canada's military justice system has evolved dramatically in recent years to meet this requirement and keep pace with changes in Canadian law. It is a unique tool that military commanders can rely upon to complement training and leadership in the maintenance of discipline.

In recent years, thousands of Canadian military personnel have deployed around the globe — at sea, on land and in the air — in support of the Government of Canada's strategic objectives. I am proud to say that the military justice system has proven indispensable in meeting the disciplinary needs of the chain of command in support of those operations.

¹ R.S.C. 1985, c. N 5 [NDA]

² S.C. 1998, c. C-25

This Report covers the final year of Brigadier-General Kenneth Watkin's four-year term as Judge Advocate General (JAG) of the Canadian Forces (CF), including his superintendence of the administration of the military justice system. It will provide background and analysis to assist Parliament and the public in understanding the current issues and concerns relevant to the military justice system.

This report will also highlight the unique and specialized support that military legal officers provide to CF commanders and the Government of Canada — both at home and abroad — to ensure that all military operations are conducted in accordance with Canada's domestic and international legal commitments.



CHAPTER 1

DISCIPLINE AND THE MILITARY JUSTICE SYSTEM

1.1 Discipline

Discipline is the foundation of a professional military, and is critical to the success of CF operations. It is instilled by training and leadership, and is supported by the law. Proper discipline serves to ensure that all members of the CF respect the chain of command and follow their assigned orders even in the face of danger, that the use of force by the military is appropriately directed and controlled, and that all members of the military share and uphold a common set of institutional and ethical values. If a military force lacks discipline, or if disciplinary issues are not addressed appropriately, then the ability of that force to achieve its missions on behalf of the Government will be seriously compromised.

Commanders in the CF are legally responsible to execute the tasks assigned to them by the Government through the Chief of the Defence Staff. These commanders are responsible for ensuring the success of military missions, promoting the well-being and discipline of the CF members under their command, and properly managing the equipment and resources entrusted to them for defence purposes. Individual CF members are, in turn, legally responsible for promptly carrying out the lawful orders of their commanders.

To fulfil their respective roles, commanders and subordinate CF members must understand and respect the legal framework in which they operate, as well as the scope and import of lawful orders. The success of military missions relies upon a well-educated and trained force that responds immediately to lawful direction and executes its tasks in an efficient manner. Discipline plays a central role in this regard, since failure to follow the rules or lawful orders can be detrimental to mission accomplishment and can put the lives of CF members and others at risk.

Maintaining discipline requires that military personnel be trained and held to high standards of both conduct and performance, and that the chain of command be accountable for maintaining these standards through leadership. Accordingly, the CF provides commanders at all levels with leadership training throughout their careers, and provides general training on discipline and military justice to all members on a progressive basis from the earliest stages of their service. Such training promotes a common understanding of

the need for discipline, and reinforces that every CF member has a role to play in maintaining it.

While training and leadership are central to the maintenance and enforcement of discipline, the chain of command must also have a legal mechanism that it can employ to investigate and sanction those disciplinary breaches that require a formal response. In the CF, that mechanism is called the military justice system.

1.2 The Military Justice System

The military justice system is a separate yet parallel system of justice within the Canadian legal framework. It is distinct from, but similar in many ways to, the civilian criminal justice system. It is expressly recognized in, and subject to, the *Canadian Charter of Rights and Freedoms*³ and finds its legislative authority in the *Code of Service Discipline* (CSD) at Part III of the *NDA*.

The Supreme Court of Canada (SCC) has, on more than one occasion, recognized and confirmed the requirement for a separate system of military justice to maintain and enforce discipline.⁴ A clear articulation of the court's view on this point was expressed by then-Chief Justice Lamer in the 1992 case of *R v. G  n  reux*:

"The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than ordinary courts, have been given jurisdiction

³ Subsection 11(f) of the *Charter* states that any person charged with an offence has the right ... "except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment."

⁴ *Mackay v. The Queen*, [1980] 2 S.C.R. 370 and *R. v. G  n  reux*, [1992] 1 S.C.R. 259

to punish breaches of the *Code of Service Discipline*. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.⁶⁵

This excerpt touches upon several key themes with regard to military justice. First, by dealing quickly and fairly with "matters that pertain directly to the discipline, efficiency and morale of the military", CF commanders enhance the operational effectiveness of the CF. Disciplined troops are well-trained, organized, highly motivated, and immediately responsive to direction, and the CF can only achieve the operational goals set by the Government of Canada when those conditions are met. If discipline breaks down, a military force cannot be relied upon to fulfil its critical mandate on behalf of the state.

If CF members break the rules, but are not held to account for their actions, it can negatively affect morale in the unit, and this is intimately tied to discipline and efficiency. The vast majority of members, who strive to uphold discipline and adhere to shared institutional values, may feel that the system has failed them by not dealing with the rule-breakers. The rule-breakers may be emboldened by this lack of response, and the disciplinary issues may worsen. Finally, others in the unit may perceive that the chain of command is condoning the actions in question, and decide to break the rules themselves. When military members fail to follow orders, then tasks cannot be carried out properly or efficiently, and this jeopardizes the success of the military mission. Lack of discipline begets further disciplinary problems, and a troublesome cycle is set in motion.

Second, the SCC notes that, "breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct." In this, the court recognizes that the negative impact of a CF member breaking the law (particularly during an overseas operation) is often disproportionately worse than if a civilian were to break that same law at home in Canada. While sleeping on the job or ignoring a supervisor's instructions might have negative career repercussions for a civilian, the same behaviour by a military member could result in death and mission failure. The military justice system allows commanders to address these realities on the spot, before disciplinary problems spread, or serious harm occurs.

⁶⁵ *R v. Généroux*, [1992] 1 S.C.R. 259 at 293

Third is the notion that, "[r]ecourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military". This statement applies equally to service offences with a purely military character (such as the above examples of sleeping on duty or disobedience of a lawful command), as well as to service offences involving the *Criminal Code* or other federal legislation, charged under section 130 of the *NDA*. All such offences have a uniquely corrosive effect on military discipline and are therefore best handled by the expertise resident in the military justice system. Presiding officers bring an intimate understanding of the needs of unit discipline to the summary trial, while military prosecutors, military defence counsel and military judges can charge, defend and try service offences with an understanding of the military context that does not exist in the civilian system.

Possible delay in proceedings is also a concern. The negative effects on discipline that arise when an incident occurs would be further compounded if the military found itself unable to investigate, charge and try an accused member in a timely way. This could occur, for example, if the accused and witnesses were all deployed overseas, with no direct recourse to Canadian law enforcement or civilian courts. Delaying proceedings until the end of the deployment would have a serious effect on morale and discipline among deployed troops, while bringing CF members back during operations to work their way through an already overburdened civilian court system would have a real and detrimental impact on the ability of the CF to achieve Canada's international objectives.

As the SCC has recognized, the military justice system provides the answer to these concerns. It is portable, deployable, and tailored to the particular needs of the military. CF commanders are trained, and empowered with the legal authority to compel military personnel to carry out orders, and they have the legal means to expeditiously proceed against those who fail to comply — regardless of where the alleged offence occurs. Likewise, military judges are ready and able to deploy wherever charges must be heard by court martial. The laws and regulations applicable to the military justice system, found principally in the *NDA* and the *Queen's Regulations and Orders for the Canadian Forces* (*QR&O*), provide the legal basis for CF commanders to fairly carry out their disciplinary responsibilities, and they are constantly monitored to ensure that the rights of CF members are respected.

CHAPTER 2

OFFICE OF THE JUDGE ADVOCATE GENERAL

2.1 The Judge Advocate General (JAG)

Under the authority of the *NDA*, the JAG is appointed by the Governor in Council and reports to the Minister of National Defence (the Minister). The JAG serves as legal advisor to the Governor General, the Minister, the Department of National Defence (DND) and the CF in matters relating to military law.⁶ "Military law" is the broad legal discipline encompassing all international and domestic law relating to the CF, including its governance, administration and activities.

Apart from his statutory advisory role, the JAG also has a statutory mandate to superintend the administration of military justice in the CF.⁷ It should be noted that "military justice" is a sub-set of "military law"⁸, and is concerned primarily with the maintenance and enforcement of discipline in the CF. In this capacity, the JAG conducts regular reviews of the military justice system and submits an annual report to the Minister on the administration of military justice in the CF.

The JAG serves at pleasure for a term not exceeding four years (which is subject to renewal), is responsive to the military chain of command for the provision of legal services in the CF, and is responsible to the Minister in the performance of his duties.

The JAG's position within the CF and DND is illustrated in the organization chart at Annex A.

2.2 Office of the Judge Advocate General (OJAG)

The OJAG is an element of the CF that supports the JAG in the fulfilment of his duties. It is staffed by regular and reserve force legal officers, civilian members of the public service, and regular and reserve force CF members from other military occupations.

⁶ *Supra* note 1, s.9.1

⁷ *Ibid.*, s.9.2(1)

⁸ The three "pillars" of military law — or put another way, the three principal sub-sets of military law — on which the JAG advises are military justice, operational law and administrative law.

All legal officers are fully qualified lawyers, members in good standing of their respective provincial or territorial law societies, and are commissioned officers in the CF, ranging in rank from Captain to Brigadier-General.

Legal officers who provide legal services to the CF or DND are under the command of the JAG, and in respect of the performance of their established duties, a legal officer is not subject to the command of an officer who is not a legal officer.⁹

As of 31 March 2010, there were 153 regular force and 55 reserve force legal officers serving across Canada and abroad. These numbers include legal officers on post-graduate courses, second-language and other academic training, as well as legal officers posted to non-advisory positions at the Canadian Forces Military Law Centre (CFMLC), which is part of the Canadian Defence Academy (CDA) in Kingston, Ontario.

Legal officers also serve with the Office of the Legal Advisor to the Department of National Defence and Canadian Forces (DND/CF LA), an organization staffed by both CF legal officers and civilian lawyers from the Department of Justice.

Permanent military legal offices are located in Ottawa at National Defence Headquarters (NDHQ) and at the four operational command headquarters¹⁰, at various CF bases and wings in each of the regions across Canada, and in Europe and the United States.

Structurally, the OJAG is composed of six sub-organizations: the Canadian Military Prosecution Service, Defence Counsel Services, and the following four divisions which are each headed by a Deputy Judge Advocate General (DJAG) in the rank of Colonel: Military Justice and Administrative Law, Operations, Regional Services, and Chief of Staff.

In addition to these permanent components of the OJAG, the *ad hoc* Military Justice Strategic Response Team (MJSRT) was established during this reporting period to address various ongoing military justice policy and legislative challenges. Each of these sub-organizations provides direct support to the military justice system.

⁹ GR&O Article 4.081(4)

¹⁰ Canada Command, Canadian Expeditionary Forces Command, Canadian Operational Support Command, and Canadian Special Operations Forces Command, all located in the National Capital Region.

Organization charts outlining the structure of the regular and reserve components of the OJAG are included at Annex B.

Canadian Military Prosecution Service (CMPS)

The CMPS is headed by the Director of Military Prosecutions (DMP).¹¹ The DMP is the senior military prosecutor in the CF, responsible for the conduct of all prosecutions at courts martial, and acting as counsel for the Minister on appeals to the Court Martial Appeal Court of Canada (CMAC) and the Supreme Court of Canada (SCC).¹² The DMP also provides legal advice in support of investigations by the CF National Investigation Service (CFNIS).¹³

The DMP acts independently from the OJAG and other CF and DND authorities when exercising his powers, duties and functions but remains under the general supervision of the JAG, who may issue written general instructions or guidelines in respect of prosecutions. The JAG may also issue instructions or guidelines in respect of a particular prosecution.¹⁴

The DMP report to the JAG for 2009–2010 is included at Annex C.¹⁵

Defence Counsel Services (DCS)

Defence Counsel Services is headed by the Director of Defence Counsel Services (DDCS).¹⁶ The DDCS is the senior defence counsel for the CF. DCS provides legal services to persons who are liable to be charged, dealt with and tried under the CSD.¹⁷

¹¹ *Supra* note 1, s.165.1

¹² *Ibid* s.165.11

¹³ The CF National Investigation Service is a unit of the CF Military Police Group that investigates serious or sensitive service and criminal offences.

¹⁴ *Supra* note 1, s. 165.17. The JAG must give a copy of every such instruction to the Minister. The DMP must ensure that such instructions are made available to the public, except in limited cases where the DMP decides that release to the public of an instruction or guideline would not be in the best interests of the administration of military justice.

¹⁵ QR&O Article 110.11 requires the DMP to report annually to the JAG on the execution of the DMP's duties and functions.

¹⁶ *Supra* note 1, s. 249.18.

¹⁷ *Ibid* s.249.19 and QR&O Article 101.20.

Although the DDCS acts under the general supervision of the JAG,¹⁸ the incumbent is independent of the OJAG and other CF and DND authorities when carrying out mandated advisory and representation functions. The JAG may issue written general instructions or guidelines in respect of defence counsel services.¹⁹ However, unlike with the DMP, the JAG has no authority to issue instructions or guidelines in respect of a particular defence case.

The DDCS report to the JAG for 2009–2010 is included at Annex D.²⁰

Military Justice and Administrative Law (MJ&AL) Division

The MJ&AL Division is responsible for legal issues dealing with military justice, administrative law, and compensation and benefits. Issues include grievances by CF members, administrative investigations and inquiries, pensions and estates, military justice policy issues and military human resources policy. In essence, MJ&AL supports the chain of command in dealing with CF personnel legal issues — whether administrative or disciplinary — across the full career spectrum from enrolment to release.

Operations Division

The Operations Division is responsible for providing legal support to the CF and DND in relation to operational law. This includes advising on current and future operations conducted in Canada and abroad. The legal officers in the Operations Division advise the CF chain of command at the tactical, operational and strategic levels, on a broad range of operational legal issues, whether domestic or international. Additionally, the Operations Division oversees all legal officers on deployed operations, and through them provides legal support to deployed CF formations, units, and military police with regard to military justice issues.

¹⁸ *Ibid.*s.249.2

¹⁹ The DDCS must make any general instructions or guidelines available to the public. See for example, *JAG Policy Directive 009/00 General Instructions in Respect of Defence Counsel Services* issued on 23 March 2000, <http://jag.mil.ca/publications/directives/Directive009-00.pdf>

²⁰ Under QR&O Article 101.20(5), the DDCS is required to report annually to the JAG on the DCS provision of legal services and performance of other duties.

Regional Services Division

Regional Services legal offices are located at various CF bases and wings throughout Canada, as well as in the United States and Germany. Through these offices, Regional Services is responsible for providing general legal support, including advice on military justice matters, to the chain of command.

Chief of Staff Division

The Chief of Staff (COS) Division is responsible for providing internal support and administrative services to the OJAG. This includes military human resource management, financial services, information management, library services and training, as well as overseeing all non-legal military personnel and civilian staff in the OJAG.

Military Justice Strategic Response Team (MJSRT)

In mid-February 2010, the MJSRT was established as a stand-alone team reporting directly to the JAG. The team is responsible for addressing a wide range of policy and legislative initiatives relating to military justice. For example, the MJSRT is responsible for the re-introduction of the legislative response to the Lamer Report recommendations²¹ and for effecting any related regulatory changes. The MJSRT is also responsible for supporting the work of the next independent review of Bill C-25 (required under section 96 of S.C. 1998, c. C-25), and for the response to the recommendations made on the military justice system by the Senate Standing Committee on Legal and Constitutional Affairs (SCOLCA) — entitled “Equal Justice, Reforming Canada’s System of Courts Martial,” dated May 2009.

²¹ The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the Provisions and Operation of Bill C-25, *An Act to amend the National Defence Act and to Make Consequential Amendments to Other Acts*, as required under section 96 of Statutes of Canada 1998, c. 35, (2003).

JAG Chief Warrant Officers (CWO) and OJAG CWOs and Chief Petty Officers 1st Class (CPO1s)

There are ten CWO/CPO1 positions within the OJAG. The JAG CWO is located at JAG headquarters in Ottawa, and serves as the senior non-commissioned member (NCM) advisor to the JAG in support of the JAG's statutory role in the superintendence of the military justice system and legal advisor on military law. Based on the command team concept, the JAG CWO provides perspective to the JAG leadership command team on strategic issues related to the CF and JAG Branch. The incumbent of the JAG CWO position ensures that the OJAG has direct access to the knowledge and experience of senior NCMs in relation to discipline. The remaining CWOs and CPO1s are located in each of the regions of Canada and are associated with either an Assistant Judge Advocate General (AJAG) office in each region or a designated Deputy Judge Advocate (DJA) office. The AJAG and DJA CWOs/CPO1s perform an important role by maintaining direct contact with senior NCMs and disciplinarians at the unit, base and formation levels, and providing an invaluable link between them and the local legal office to address disciplinary matters. The OJAG CWO/CPOs, with the assistance of their regional legal officers, also provide valuable military justice training to their clients. They assist legal advisors in their objectives to provide solution-oriented and operationally focused legal advice. They also look after the welfare of all JAG personnel, promoting excellence, professionalism and teamwork.

2.3 Legal Officers Serving Outside the OJAG

Canadian Forces Military Law Centre

The Canadian Forces Military Law Centre (CFMLC) is not a sub-organization of the OJAG. Rather, it is the military legal education and training delivery organization for the CF, located in Kingston, Ontario. The CFMLC, and the legal officers posted there, are under command of the Commander, Canadian Defence Academy (CDA). While occupying positions at CFMLC, legal officers do not provide legal advisory services to CDA, but instead focus on the design, development and delivery of military legal education and training. The focus of CFMLC is to provide and extend legal education and training to the CF at all levels, with a view to enhancing the overall operational effectiveness of the CF.

Legal Support on Deployed Operations

When elements of the CF deploy on operations across Canada or around the world, legal officers deploy with those elements to provide dedicated legal support to commanders and staff on the ground. As uniformed members of the CF, legal officers are trained and equipped to live and work in almost any operational environment. This flexibility means that they can provide the chain of command with direct and independent legal advice during the actual conduct of operations.

During the 2009–2010 reporting period, the OJAG deployed thirty-four (34) legal officers — both Regular Force and Reserve — in support of international operations in Afghanistan, the Democratic Republic of Congo, Sudan, Haiti, and onboard Her Majesty's Canadian Ships at sea. As with the 2008–2009 reporting period, this number represents an international deployment percentage of over 20% of the OJAG's regular force establishment strength.

On the domestic front, the OJAG deployed 16 additional legal officers to British Columbia in support of CF units assisting the RCMP with security during the 2010 Winter Olympic Games in Vancouver.

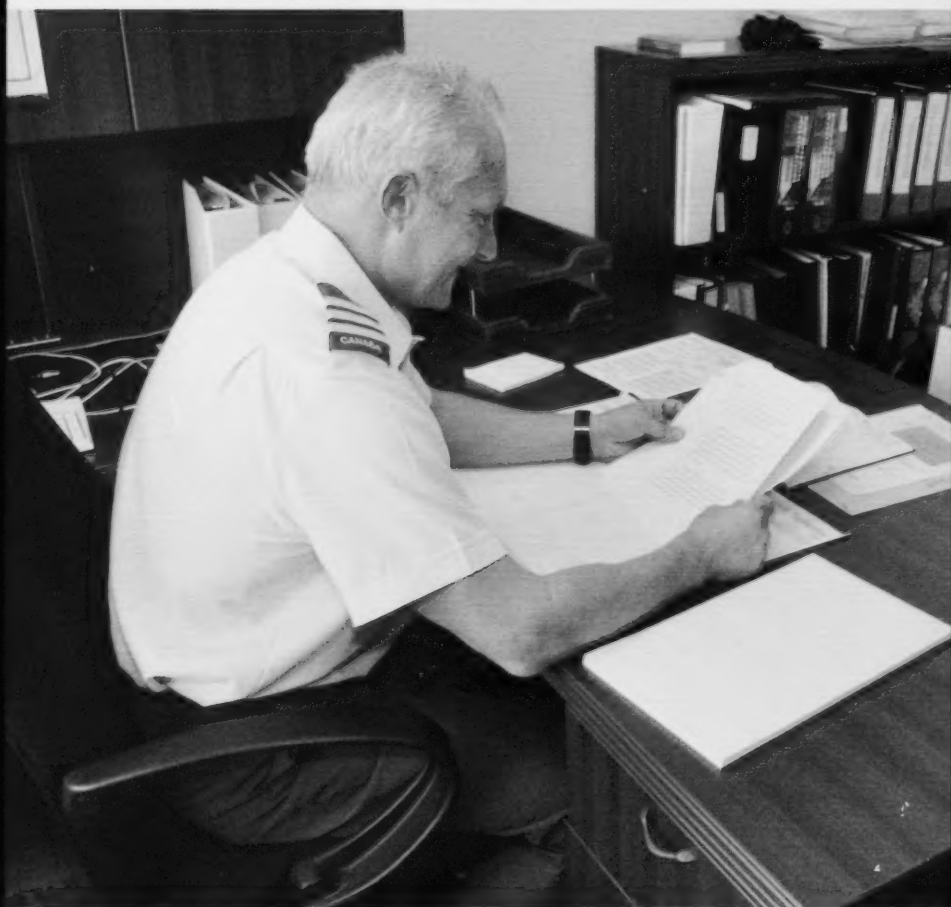
Office of the DND/CF Legal Advisor (DND/CF LA)

While the JAG superintends the administration of military justice and provides advice on matters relating to military law, the DND/CF LA also provides legal support to DND and the CF. The Office of the DND/CF LA is a legal services unit of the Department of Justice, and its staff is comprised of both lawyers from the Department of Justice and military legal officers posted from the OJAG.

The areas of military law for which the Office of the DND/CF LA has primary responsibility are: legislative and regulatory services, finance (other than military compensation and benefits), claims and civil litigation, materiel procurement, intellectual property, environment and real property, civilian labour relations, and public law — including human rights, Aboriginal law and information and privacy issues. As well, DND/CF LA has dedicated counsel to provide specialized legal services in the area of non-public property — a valuable resource to legal officers giving advice in this area.

Legal Community

In addition to their regular duties, legal officers also make an effort to participate in outside activities related to military law issues. For instance, during this reporting period, legal officers continued to occupy leadership positions in the legal community, including chairing the Canadian Bar Association's National Military Law Section (NMLS). The NMLS focuses on the military justice system and operational law, as well as the uniquely military aspects of criminal, human rights, air, maritime and international law. This section of the CBA has a strong membership comprised of both civilian legal practitioners and uniformed legal officers.



CHAPTER 3

MILITARY JUSTICE YEAR IN REVIEW

This chapter will provide a brief overview of the CSD and the two types of service tribunals by which alleged violations of the CSD are addressed. It concludes with a brief statistical summary of proceedings conducted during this reporting period, with an emphasis on several noteworthy cases and trends.

3.1 The Code of Service Discipline (CSD)

The CSD is found at Part III of the *NDA*, and sets out the foundation of the Canadian military justice system. It prescribes disciplinary jurisdiction, pre-trial and trial procedures, offences and punishments, as well as post-trial and appeal procedures. The CSD is engaged when an alleged service offence occurs in Canada or elsewhere.²² It applies to regular force CF members at all times and to members of the reserve force in specified circumstances. Furthermore, the CSD can also apply to civilians in limited circumstances.²³ Service offences include unique military offences as well as violations of the *Criminal Code* and other federal statutes.²⁴

3.2 Service Tribunals — Summary Trial and Court Martial

The CSD provides for two types of service tribunals. “Service tribunal” is defined in section 2 of the *NDA* to mean a court martial or a person presiding at a summary trial. The first type, the summary trial, is presided over by military commanders and is intended as an expedient and fair means to deal with minor service offences at the unit level. In fact, the vast majority of disciplinary matters are dealt with at summary trial. The jurisdiction and powers of these tribunals are very restricted, however. Military commanders who preside at summary trials must be trained and certified by the JAG as being competent in their duties as presiding officers, and must maintain that currency by re-certifying every four years.²⁵

²² *Supra* note 1, s.67

²³ *Supra* note 6

²⁴ *Supra* note 1, s.130

²⁵ OR&O 101.09 refers. Note also that every four years, qualified presiding officers require re-certification, which is done online through Presiding Officer Re-certification Test (PORT).

In all but the most minor of cases, the *QR&O* require that charge-laying authorities obtain mandatory legal advice prior to laying charges, and that presiding officers to whom charges are referred obtain legal advice before proceeding to summary trial.²⁶ Apart from these regulatory requirements, presiding officers are always free to seek the advice of legal officers at any time prior to or during a trial.

Findings of guilt and sentences awarded at a summary trial are subject to review by a superior officer, either at the request of an offender, or on the independent initiative of the chain of command if there are procedural or substantive concerns about the proceedings.²⁷ The *QR&O* require that review authorities seek legal advice prior to making a decision on such a review.²⁸

The second type of service tribunal is the court martial. Courts martial are presided over by military judges and function in a similar fashion to civilian criminal courts. Accused persons facing trial by court martial are entitled to publicly-funded legal representation by Defence Counsel Services (DCS), or they may hire a civilian lawyer at their own expense. Prosecutions are conducted by legal officers from the Canadian Military Prosecution Service (CMPS). Formal rules of evidence apply to the proceedings, and court martial findings and sentences may be appealed to the Court Martial Appeal Court of Canada, which is composed of civilian Federal Court and Provincial Superior Court justices (the CMAC). The next and final level of appeal beyond the CMAC is the Supreme Court of Canada (SCC).

3.3 Service Tribunals Conducted — 2009–2010 Reporting Period

A total of 1,998 service tribunals were held during the reporting period, representing 1,942 summary trials and 56 courts martial. The total number of proceedings has remained relatively constant in recent years. Of interest is the fact that summary trials continue their historical trend of representing approximately 97% of all service tribunals held in a given year.

²⁶ *QR&O* 107.03 and 107.11 refer.

²⁷ *QR&O* 108.45 and 116.02 refer.

²⁸ *QR&O* 108.45(8)

3.4 Summary Trials During the Reporting Period

Detailed statistics for the summary trials held during the reporting period are provided at Annex E.

For the vast majority of offences, an accused has the right to elect trial by court martial.²⁹ Interestingly, the proportion of members who elect court martial has decreased steadily from 8.5% in 2006 to 4.69% during this reporting period. The decline in the number of accused persons electing trial by court martial appears to confirm that accused persons are confident in the summary trial process.

Over half of all charges during this reporting period were laid under s.129 of the *NDA* for acts, conduct or neglect to the prejudice of good order and discipline. This offence offers the chain of command a means of addressing a variety of military-specific disciplinary breaches, including:

- Offences detrimental to operational effectiveness, such as unauthorized discharges (which relate to safe and effective weapons handling);
- Offences related to operational materiel, including the loss or misuse of CF-issued equipment;
- Offences related to dress and deportment;
- Offences involving harassment, inappropriate comments, inappropriate use of the Internet, and fraternization³⁰;
- Offences related to improper possession or consumption of alcohol, such as consuming alcohol in a theatre of operations when prohibited; or
- Breaches of regulations, orders, or other instructions.

The right to elect trial by court martial arose in 47.83% of cases involving charges under s.129 of the *NDA*, although only 2.35% of accused ultimately elected court martial.

During the reporting period, requests for review of summary trial findings and/or sentences were made in 38 cases. Eighteen of these — or 47% — were initiated by offenders, while 20 reviews — or 53% — were initiated by the chain of command, often on the advice of a legal officer conducting post-trial reviews of summary trial materials. This represents an overall review rate of

²⁹ QR&O 108.17

³⁰ Serious offences of a sexual nature such as sexual assault are dealt with at courts martial. There were 84 charges of a sexual nature laid against 51 accused during this reporting period dealt with by summary trial.

only 2.0% when considered in light of the total number of summary trials held. In 71% of the reviews conducted, the review authority took some action favourable to the offender (whether set aside a finding of guilty on the ground that it is unjust or reduce a sentence on the ground that is unjust or too severe), whereas the remaining 29% of review situations saw no changes made to the summary trial decision.

3.5 Courts Martial During the Reporting Period

A total of 56 courts martial were held during this reporting period, reflecting a decrease from the 65 courts martial held in the 2008–2009 reporting period. The annual reports of the DMP and the Director of Defence Counsel Services (DDCS) at Annexes C and D provide further detail on these proceedings.

The following courts martial, completed during the reporting period, are of particular interest as they were high profile cases involving important questions of criminal and military law:

*R. v. Wilcox*³¹ On 6 March 2007, Corporal (Cpl) Megency and Cpl Wilcox were working with other members of their section at Entry Control Point 3 (ECP3) at Kandahar Airfield in Afghanistan. At the end of their shift, Cpl Megency and Cpl Wilcox were transported to their shared accommodation tent. Shortly thereafter, a shot was heard and a number of nearby personnel responded to screams coming from the tent. Upon entering the tent, members of the platoon noticed the presence and smell of gun smoke. Cpl Wilcox was seen lowering Cpl Megency to the ground. Cpl Megency had suffered a single gunshot wound to the chest, and eventually succumbed to his injury.

Cpl Wilcox was subsequently charged with three offences under the CSD, namely manslaughter, criminal negligence causing death, and negligent performance of a military duty. On 30 July 2009, Cpl Wilcox was found guilty by a General Court Martial of two offences: criminal negligence causing death and negligent performance of a military duty.

On 30 September 2009, the military judge sentenced Cpl Wilcox to four years imprisonment and dismissal from Her Majesty's Service. Cpl Wilcox filed a Notice of Appeal with the CMAC, appealing both the finding and the sentence imposed. As of the end of this reporting period no decision had been

³¹ *R. v. Corporal M.A. Wilcox*, 2009 CM 2014

made concerning the appeal.³² Additional details will be provided in the next annual report.

*R. v. Semrau*³³ Captain (Capt) Semrau was deployed to Afghanistan in August 2008. He was a member of the Operational Mentoring and Liaison Team (OMLT) assigned to the 2nd Kandak (Battalion) of the Afghan National Army (ANA). An OMLT is a CF unit whose primary responsibility is to train ANA soldiers on western military ethics, tactics and standards.

On 19 October 2008, Capt Semrau and his three-man Canadian mentoring team participated in a clearing patrol outside of the city of Lashkar Gah, in Helmand Province (which neighbours Kandahar Province to the west). During that morning's operation, Capt Semrau and his team, accompanying an ANA infantry company, came across a severely wounded, suspected insurgent. The ANA company commander told the CF personnel not to treat or administer aid to the wounded man. Following a short discussion, this course of action was agreed to by the CF personnel.

The CF and the ANA moved forward, whereupon they encountered a second suspected insurgent, apparently deceased. Capt Semrau, another CF member, and an ANA interpreter then returned to the location of the first suspected insurgent. It was at this time that Capt Semrau fired into the body of the first insurgent with his CF issued C-8 rifle.

Following an investigation by the CF National Investigation Service (CFNIS), Capt Semrau was arrested on 30 December 2008, retained in custody, and repatriated back to Canada. Following a court hearing, he was released with conditions on 7 January 2009. On 17 September 2009, three charges were preferred by the DMP against Capt Semrau, namely second degree murder, attempt to commit murder with a firearm, and cruel or disgraceful conduct. The trial commenced during the reporting period. Additional details will be provided in the next annual report.

³² On 18 October 2010, the CMAC set aside the guilty findings and directed a new trial for Ex Cpl Wilcox, on the grounds that the court martial panel had been improperly constituted. DMP preferred new charges on 29 October 2010.

³³ *R. v. Semrau*, 2010 CM 1002

3.6 Court Martial Appeals

During this reporting period, 21 appeals were heard before the CMAC. All of these appeals, save for one, were initiated by the offender. The CMAC rendered decisions in eight of the appeals during the reporting period.

Additionally, one notice of appeal³⁴ and one application for leave to appeal³⁵ were filed with the SCC, both by offenders whose appeals had been denied by the CMAC. At the end of this reporting period, the SCC had not yet rendered decisions concerning these appeals.

Detailed information on the court martial appeals heard during this reporting period can be found in the Report of the DMP at Annex C, and the Report of the DDCS, at Annex D.

3.7 Summary Trials — Unauthorized Discharge of Weapons

The majority of charges laid with respect to the unauthorized discharge of a weapon again involved CF members in training environments. During the 2009–2010 reporting period, a total of 523 charges were heard at summary trial for this type of offence. Of these, 420 — or 80% — were related to training incidents, while the remaining 103 — or 20% — occurred during operations. These numbers are generally consistent with prior reporting periods, and continue to reflect the same statistical division between unauthorized discharges occurring in training and on operations. Overall, summary trials involving unauthorized discharges represented 27% of all summary trials held during 2009–2010, a 5% increase from the 2008–2009 reporting period. This increase may be attributable to a 17% increase in the number of recruits and officer cadets attending the Canadian Forces Leadership and Recruit School during the reporting period.

3.8 Summary Trials Conducted on Operations

The maintenance of discipline during operations is of vital importance to military commanders at all levels in the chain of command. The charges dealt with during the reporting period reflect how seriously operational commanders

³⁴ *Szczetbaniewicz v. The Queen*, 2009 CMAC 513, appealed to SCC.

³⁵ *Savaria v. The Queen*, 2010 CMAC 525, leave to appeal to SCC requested.

view alleged breaches of the CSD, particularly where those breaches could potentially affect the safety of CF personnel. The portable and deployable nature of the military justice system gives commanders the means to promptly and fairly deal with disciplinary allegations in the field. This flexibility allows disciplinary matters to be expeditiously addressed, so that those involved can continue to carry out their responsibilities with as little disruption as possible to the operational effectiveness of their units.

The vast majority of disciplinary incidents tried during CF operations for this reporting period occurred in Afghanistan, with a total of 268 charges laid for in-theatre offences. The most common offences were related to the unauthorized discharge of a weapon (103 charges laid) and failure to properly secure a weapon or failure to wear mandated personal protective equipment (36 charges laid).



CHAPTER 4

MILITARY JUSTICE TRENDS AND ISSUES

In his capacity as superintendent of the administration of military justice, the JAG tasked the Director of Law Military Justice Policy and Research (DLaw/MJP&R) and the JAG Chief Warrant Officer (JAG CWO) to personally conduct a series of interviews with some of the main participants in the military justice system, including presiding officers, charge-layers, assisting officers, and — for the first time — accused members. These interviews were conducted at the conclusion of the reporting period at selected bases/establishments across the country.

Prior to the advertised interview periods, a questionnaire was distributed to the chain of command in Victoria, Edmonton, Winnipeg, Shilo, St. Jean and Valcartier, with the goal of obtaining feedback from a sample group that spanned all three elements, and crossed both linguistic and geographic lines. CF members voluntarily completed this questionnaire, and ultimately a total of 134 members were interviewed in person at the above-noted locations by DLaw/MJP&R and the JAG CWO.

While this number represents a small sample of all military justice participants in a given reporting period, their answers were nevertheless very instructive in identifying areas where the military justice system is seen to be effective, and areas where there remains room for improvement. Given the careful methodology applied, and the confidential nature of the interviews, there is a high degree of confidence in the results obtained.

4.1 Rationale

The overall objective of the interviews was to obtain face-to-face feedback from a representative sample of military justice participants on the functioning of the military justice system. In particular, the interview questions focused on receiving relevant feedback in order to:

- determine the level of satisfaction with the military justice system and gauge its usefulness as a tool for both establishing and maintaining discipline;

- identify systemic and local concerns relating to the military justice system; and
- determine the general level of satisfaction with the legal support provided by unit level legal advisors and by Defence Counsel Services (DCS) when using the military justice system.

4.2 Findings

A. General

Based on the interviews, the following are key findings:

- The military justice system as a whole effectively meets the needs of the chain of command;
- The roles of the key players in the summary trial system are generally understood by most participants. However, further education on the role of the assisting officer is warranted;
- There is a desire for additional military justice training;
- The level of satisfaction with the legal support provided in relation to military justice matters is generally quite high; and
- Accused members generally perceive the summary trial system as fair.

B. Effectiveness of the Military Justice System

The majority of presiding officers and charge-layers interviewed expressed a positive view of the military justice system and took the view that the system is meeting the needs of the chain of command. These positive opinions were based in part on the improvements made to the system during the late 1990s. The focus placed on military justice training — and the increased opportunities for individuals to receive that training — have fostered a greater understanding of the military justice system within the CF community.

While the majority of responses were positive, concerns were nevertheless raised in relation to the timeliness of proceedings and the complexity of court martial and summary trial procedural requirements. It is worth noting at this point that the OJAG is currently working on regulatory amendments to continue to reduce delays in the system.

When asked to identify those areas within the military justice system that are working well, the most common answers provided were: the summary trial process, military justice training, and the legal support provided.

C. Assessment of the Summary Trial System

The presiding officer, charge-layer and assisting officer each play an important, but distinct, role in the summary trial process, and each must remain relatively independent of the others in order to ensure fairness and transparency throughout.

Presiding Officers

The officers who can exercise summary trial jurisdiction over CF members are the commanding officers, delegated officers and superior commanders. A commanding officer is normally in respect of an accused person, the commanding officer of the accused person, but may also include the officers described in *QR&O* article 101.01. A commanding officer has jurisdiction over officer cadets or NCM below the rank of warrant officer. A commanding officer may also delegate to a delegated officer his powers to try summarily an accused person under the commanding officer's command, but with limited powers of punishment. Finally, a superior commander may try an officer below the rank of lieutenant-colonel or an NCM above the rank of sergeant.

The presiding officers interviewed generally saw their role as an impartial trier of the facts presented during a summary trial. A number of presiding officers saw summary trials as an opportunity to educate, train and discipline not only the accused but also those members of the unit in attendance to watch the trial. Consistent with these views, many of the presiding officers interviewed make it a practice to have unit members attend each trial so that the unit members are provided with an opportunity to see how the military justice system works. They also see it as a way to further the sentencing goal of general deterrence where an accused is found guilty.

The presiding officers interviewed all expressed positive comments regarding the Presiding Officer Certification Training (POCT) course, which is a mandated pre-requisite for all presiding officers before they are permitted to conduct summary trials.³⁶ The knowledge gained during the POCT was found to be of great assistance during the actual conduct of summary trials, and in helping presiding officers gain a better understanding of military justice

³⁶ *Supra* note 26

as a whole. One consistent theme raised by the presiding officers interviewed was the need for a mock trial (role-playing) to be built into the two-day course, or to be added on as a third day of training.

A minority of presiding officers felt uncomfortable with their role due to a lack of experience and/or the significant passage of time between their initial POCT and their first summary trial.³⁷ It was apparent that this lack of confidence led to a number of problems, including a disinclination to use the summary trial system, an over-reliance on the charge-layer to ensure that any charge coming before the presiding officer was going to be an admission of the particulars, and an over-reliance on the legal advisor to advise as to a specific sentence to impose, rather than advising on a reasonable range of appropriate sentences.

While these concerns were not expressed during the majority of the presiding officer interviews, they are still of concern given their potential impact on the effectiveness of the system. Accordingly, these minority perspectives must be noted for consideration and discussion during future training of presiding officers. These points have been passed to the Canadian Forces Military Law Centre (CFMLC) for incorporation into their future training plans.

Charge-Layers

Charge-layers are the following persons who are authorized to lay charges under the CSD: a commanding officer, an officer or an NCM authorized by a commanding officer to lay charges or an officer or an NCM of the Military Police assigned to investigative duties with the Canadian Forces National Investigation Service. Most of the charge-layers interviewed clearly understood their roles and were familiar with the applicable regulatory requirements. However, some participants felt that if a charge resulted in an acquittal, then the charge-layer would be seen as having failed to do his or her job correctly. In addition, some charge-layers stated that they would not lay a charge if there were a chance for acquittal, even if the charge-layer had an actual and reasonable belief that the accused committed the alleged offence.³⁸

The POCT course is not a pre-requisite for charge-layers to carry out this duty on behalf of their commanding officers, however many of the interviewees

³⁷ *Ibid.*

³⁸ QR&O 107.02 Note: A "reasonable belief" is a belief which would lead any ordinary prudent and cautious person to the conclusion that the accused is probably guilty of the offence alleged.

did attend that training. Those who took the two day course found it very useful. Charge-layers generally felt that some type of standardized training was essential to ensure that they were performing this important role in the manner required and in accordance with the law. To address these concerns, the JAG has recommended that a specific training program be developed by the CFMLC to enhance the formal training opportunities available to charge-layers across the CF.

Assisting Officers

The role of an assisting officer at summary trial is to guide the accused through the process, ensure that the accused has the appropriate information and evidentiary disclosure to adequately prepare and make informed decisions about his or her rights, and assist the accused in the preparation and presentation of the case — to the extent desired by the accused.³⁹ It is important to note that an assisting officer is not legal counsel, and does not fulfill the role of defending officer for the accused.

QR&O article 108.14 requires that an assisting officer be appointed for an accused as soon as possible after a charge is laid. Every effort is made to appoint the assisting officer chosen by the accused, as long as that person is available and willing to perform the role.

Interviews suggested that most assisting officers took a limited role in assisting the accused during the summary trial process. In some cases, this can be attributed to the accused deciding to take a more independent role in the preparation of his or her case. Responses suggested that in many instances, however, assisting officers felt ill-prepared to fulfill their duties. This was often attributed to insufficient training.

While a reference guide for assisting officers⁴⁰ setting out their role and key responsibilities is available on the Defence Internal Network, the OJAG recognizes that further training is warranted to ensure that this important function is carried out as effectively as possible. To that end, as first noted in the 2008–2009 annual report, the CFMLC has begun developing an Assisting Officer training package for CF personnel. The goal is to make this material available CF-wide as a self-study program on the DNDLearn system by the Fall of 2011.

³⁹ *QR&O* 108.14 refers.

⁴⁰ *The Election to be Tried by Summary Trial or Courts Martial — Guide for Accused and Assisting Officers* (A-LG-050-000/AF-001) — available on the JAG website.

Accused persons

Interestingly, accused members (predominantly represented by junior-ranking NCMs) stated that their experience with — and exposure to — the workings of the military justice system was quite limited, even after having been charged and tried. Recruit level training on military justice is basic in nature, and does not provide them with much in-depth understanding of the summary trial or court martial processes.

It is clear that more training on the military justice system is required at all levels. A concerted effort will be made, in cooperation with the CFMLC, to plan for the delivery of such additional training.

D. Adequacy of Legal Support

There is a very high level of satisfaction with the legal support provided to military justice system participants from the perspective of presiding officers, charge layers, assisting officers and accused persons. Presiding officers found that legal officers responded relatively quickly to their needs throughout summary trial proceedings. Interestingly, some participants noted that legal support on deployed operations was better in two significant ways.

First, legal support from a deployed legal officer was found to be timelier than from legal officers located on bases (referred to as unit legal officers), where the turn-around time on legal advice was notably slower. Second, deployed legal officers seemed to have a better understanding of the needs of the chain of command and were much more in tune with the ongoing disciplinary issues of the units in question.

These comments are not surprising, given the fact that deployed legal officers are typically embedded within a task force headquarters as the dedicated legal advisor, whereas unit legal officers are typically centralized as a lodger unit on a base, and might find themselves responding to legal support requests from (on average) ten to thirty separate CF units in a given geographic area. Nevertheless, unit legal officers are encouraged to visit, train and participate in operational exercises with these units to better familiarize themselves with the specific needs and challenges of each unique chain of command.

While charge-layers also felt that the legal advice provided to them was generally effective, they too distinguished between the nature of the legal advice received on operations and that received at home from unit legal officers. Some charge-layers found the advice given on operations to be more

succinct, and the legal advice given at home in garrison to be more "legalistic". Much of this can likely be attributed to the fact that deployed operational environments legitimately demand (and receive) much faster turn-around time for legal support requests given the pace of operations. Legal opinions in such cases tend to focus less on the detailed elaboration of the underlying rationale for the opinion, and more on the legal "bottom line".

Assisting officers do not typically speak to base or unit legal officers when seeking assistance with their duties, as these individuals are the advisors for the chain of command, and would likely have advised on the charges the accused member in question is facing. To avoid a potential conflict of interest, assisting officers are therefore encouraged to contact DCS with their questions. When assisting officers did speak to legal officers within DCS, they reported that DCS personnel were interested and helpful in explaining the role of an assisting officer, and in aiding the accused through the process.

Most accused members recall being informed of their right to counsel, but many had no contact with DCS legal counsel or civilian lawyers. Those accused who did contact DCS counsel found them to be informative and useful.

E. Accused Perception of Fairness

Accused persons interviewed were notably positive about the military justice system and there was an overall view that they were fairly treated. They received timely disclosure, they had sufficient time to prepare for their elections (where applicable) and their summary trials, and they were provided reasonable opportunities to contact counsel. At their summary trials, their choice of language of trial was honoured and they were given opportunities to ask questions and present their positions.

Despite this, some accused stated that they had not been informed of their right to request a review of the findings or the sentence.⁴¹ Others indicated that they had been informed of their right to review, but not told that a

⁴¹ QR&O 108.45 refers. Offenders have the right to request a review of the finding and/or sentence imposed at summary trial, within 14 days of the completion of the proceedings.

review authority had no power to increase the punishment awarded at summary trial.⁴²

Although these points already feature in the military justice training provided to CF members, legal officers providing such training — and those advising presiding officers — will reiterate the requirement for presiding officers to make offenders aware of the existence and scope of the right of review.

4.3 Conclusion

As a whole, the participants in this process were very appreciative of the opportunity to meet with members of the OJAG on military justice issues and express their opinions of the military justice system. Each participant appeared comfortable in expressing his or her own personal experiences and views. Such comfort was increased by the fact that the interviews were confidential, with no personal attribution. The participants were encouraged to be part of an ongoing process to improve the effectiveness and fairness of the system.

Overall, the responses by the presiding officers, charge layers, assisting officers and accused were positive despite certain criticisms highlighted above. It is obvious that the participants care about the military justice system. This is particularly true with the summary trial system. All participants were interested in the questions posed during the interviews and were anxious to share their experiences, both good and bad. They saw the interviews as an opportunity to make the system better and were candid about areas that they felt needed improvement.

The OJAG will continue with interviews of military justice participants in the future to provide the JAG with valuable first-hand information to support his superintendence function. These interviews also demonstrate to the users of the military justice system that their experiences matter, and that their input helps to shape future changes.

⁴² A review authority acting under QR&O article 108.45 is an authority having the power to quash a finding of guilty, substitute a new finding for any finding of guilty, and alter a sentence imposed at summary trial (see article 116.02 — *Review Authorities — Summary Trials and the notes to that article*) and to suspend the carrying into effect of a punishment of detention (see article 114.02 — *Authority to Suspend*). Note that a review authority cannot substitute a new sentence higher on the scale of punishments in place of the one imposed at trial, or replace a not guilty finding with a guilty finding.

CHAPTER 5

LEGISLATIVE, REGULATORY AND POLICY INITIATIVES

The following legislative, regulatory and policy initiatives have a direct impact on the military justice system. These initiatives reflect the sophisticated nature of the military justice system, which continually evolves in concert with societal standards and Government priorities in order to promote the rule of law and the maintenance of discipline.

5.1 Interdepartmental Collaboration

The OJAG worked with officials from the Departments of Justice and Public Safety on a variety of matters during the 2009–2010 reporting period. This interdepartmental cooperation saw the OJAG contribute to the advancement of several justice-related initiatives of the Government of Canada.

As one important example, the OJAG worked with Justice Canada and Public Safety Canada to develop legislative amendments to strengthen the National Sex Offender Registry (NSOR). Within the military justice context, courts martial may order offenders to comply with the federal *Sex Offender Information Registration Act*⁴³ upon conviction for a designated offence.

Bill S-2, the *Protecting Victims from Sex Offenders Act*, was introduced on 17 March 2010.⁴⁴ Among its provisions, the Bill provides that an offender convicted of a designated sexual offence will automatically be required to register in the NSOR. The Bill will also enable police to access the NSOR for the purpose of preventing a crime of a sexual nature, instead of restricting access to circumstances where police are investigating a crime that has occurred. Bill S-2 is expected to continue to proceed through Parliament in the next reporting period.

⁴³ R.S.C. 2004, c. 10

⁴⁴ Bill S-2 the reintroduction of former Bill C-34 was tabled on 1 June 2009 but died on the Order Paper when Parliament was prorogued on 30 December 2009.

5.2 Initiatives Specific to Military Justice

Lamer and Senate Committee recommendations

In recent years, the military justice system has been the subject of wide-ranging recommendations by the former Chief Justice of the Supreme Court of Canada, the late Right Honourable Antonio Lamer,⁴⁵ and by the Senate Standing Committee on Legal and Constitutional Affairs (SCOLCA). The Senate Committee Report⁴⁶ contained nine recommendations, many directly related to matters addressed in legislation previously introduced by the Government. The Government reviewed and considered the Committee's recommendations, and either agreed to — or agreed to further study — all nine recommendations. The Government's response to the Senate report was tabled in the Senate on 22 October 2009.

External reviews of the Canadian Military Prosecution Service (CMPS) and Defence Counsel Services (DCS)

External reviews of the CMPS and the DCS have been completed and discussed in previous Annual Reports. The impact of the review of the CMPS is described in the DMP report at Annex C. With regard to the review of the DCS, which was delivered subsequently, the OJAG is currently reviewing the recommendations with a view to improving delivery of defence counsel services to accused persons under the CSD.

Delay

The OJAG continued to develop *QR&O* amendments intended to reduce delay in the military justice system. Another initiative that is expected to alleviate some of the delay in the military justice system is electronic disclosure. As all police reports are now prepared electronically, this initiative involves coordination with the Canadian Forces Provost Marshal (CFPM).⁴⁷

The DMP report at Annex C discusses further efforts to alleviate delay within the court martial system.

⁴⁵ *Supra* note 19.

⁴⁶ *Equal Justice: Reforming Canada's System of Courts Martial* was tabled on 5 May 2009.

⁴⁷ The CF Provost Marshal is the senior military police officer in the CF.

CHAPTER 6

CONCLUSION

Discipline is the cornerstone of a professional military. This report has addressed one aspect of the maintenance of discipline — the military justice system. In the ten years since Bill C-25 implemented significant changes, the Canadian military justice system has continued to make strides in improving its relevance and utility to the CF chain of command, while ensuring fairness to accused persons.

The statistics from this reporting period and the interviews conducted with stakeholders indicate that not only the military chain of command, but also those persons accused of an offence under the CSD, continue to have confidence in the military justice system. Given the high operational tempo of the CF, the need to ensure discipline on deployment has never been greater, and commanders have made frequent use of the military justice system to support those operations and achieve their disciplinary aims. With this increased operational tempo comes a heightened demand for legal services abroad. Legal officers have therefore continued to deploy in record-high numbers during the 2009–2010 reporting period.



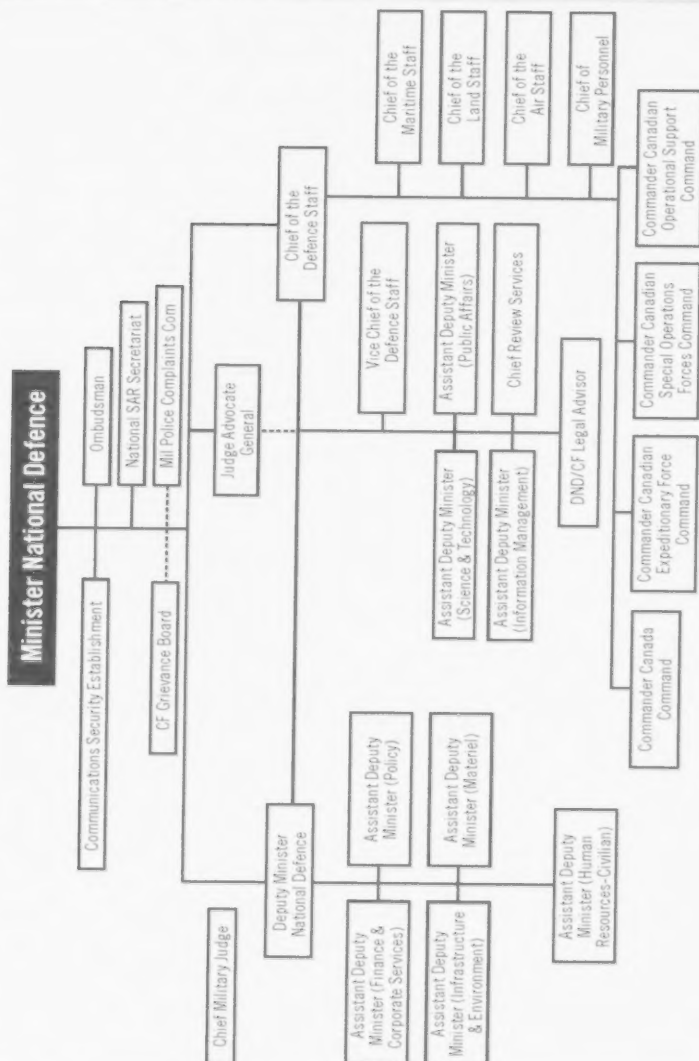
One of the critical functions of the OJAG is to continually assess how further improvements can be made to the military justice system. At home, this involves ongoing participation in interdepartmental initiatives of interest to the military justice system, with the goal of ensuring that the system remains in step with developments in the broader Canadian legal framework. It also involves a continual process of assessment, analysis and communication with internal participants, as their continued reliance on fair and timely military justice to support CF operations is the best endorsement of the system's effectiveness.

By equipping the chain of command with the right tools to maintain and enforce discipline, the CF positions itself to succeed as a disciplined and professional armed force wherever it deploys. The Canadian military justice system — the most indispensable of those disciplinary tools — has seen improvements in its structure, fairness, and employment over the past decade, and throughout this reporting period. With vigilant superintendence to maintain it, and forward-looking initiatives to strengthen it, this system will keep evolving to meet the CF's disciplinary needs for years to come.



ANNEX A

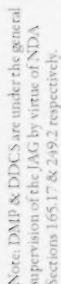
ORGANIZATION CHART DISPLAYING THE RELATIONSHIP OF THE JUDGE ADVOCATE GENERAL TO THE MINISTER, THE CHIEF OF THE DEFENCE STAFF AND THE DEPUTY MINISTER



NOTE: CMS, CLS and CMP are also Commanders of Maritime, Land Force, Air and Military Personnel Commands respectively.

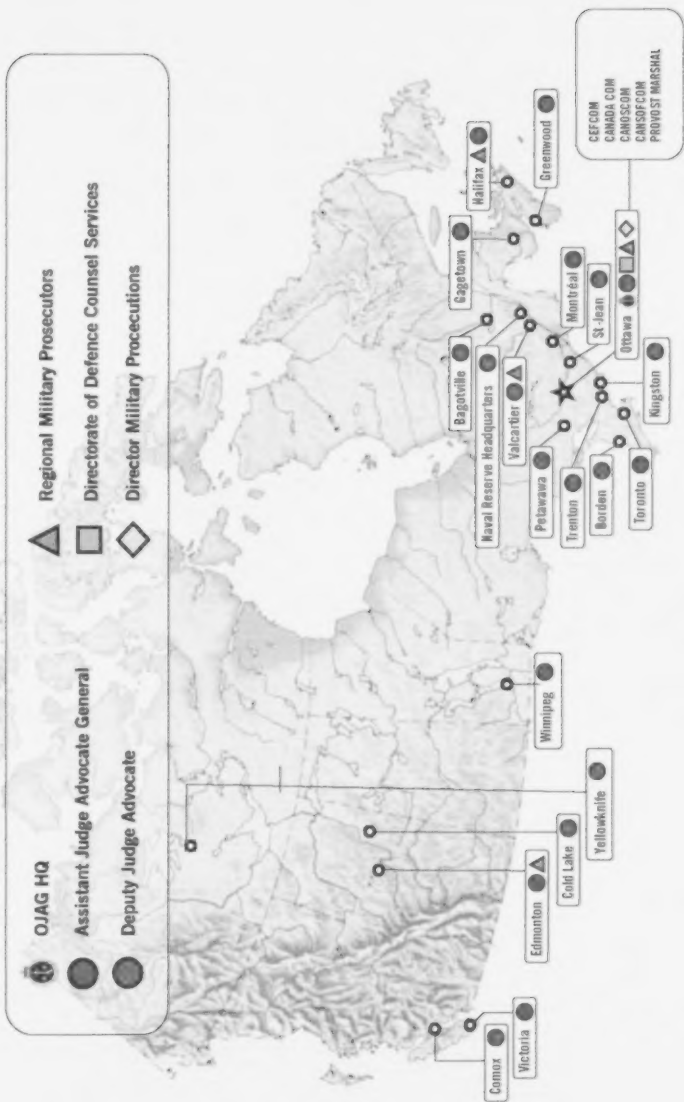
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ORGANIZATION CHART OF THE OFFICE OF
THE JUDGE ADVOCATE GENERAL
MAPS OF THE JUDGE ADVOCATE GENERAL OFFICE



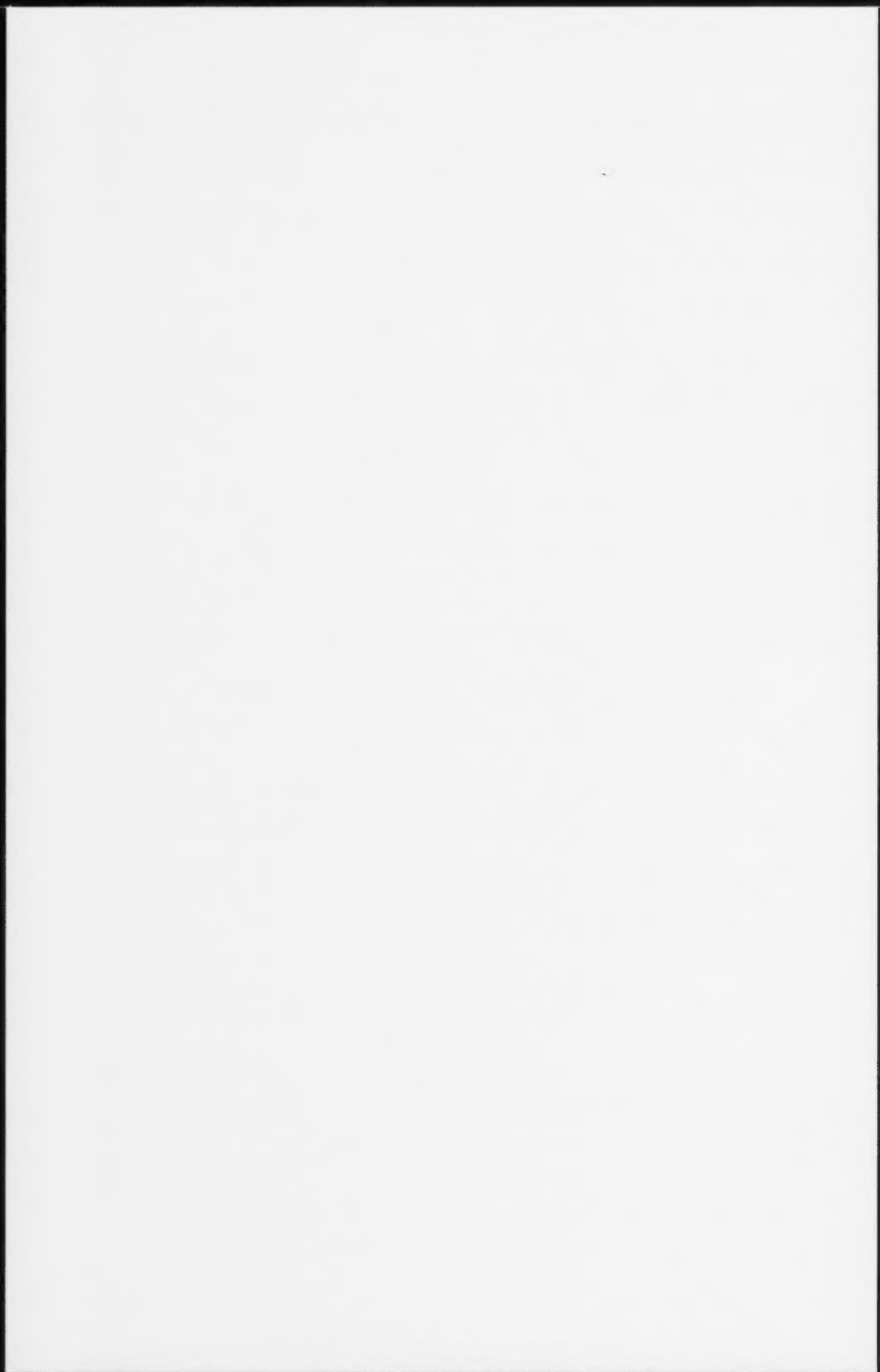
ANNEX B ORGANIZATION CHART OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL AND MAPS OF THE JUDGE ADVOCATE GENERAL OFFICE

Canadian offices of the Judge Advocate General



Offices of the Judge Advocate General outside Canada





ANNEX C

ANNUAL REPORT OF THE DIRECTOR OF MILITARY PROSECUTIONS

SECTION 1 — Introduction

This report, covering the period of 1 April 2009 to 31 March 2010, is prepared in accordance with article 110.11 of the *Queen's Regulations and Orders for the Canadian Forces (QR&O)*, which requires the Director of Military Prosecutions (DMP) to report annually to the Judge Advocate General (JAG) on the execution of his duties and functions.¹ This report is organized into sections that will discuss the following:

- The Canadian Military Prosecution Service's (CMPS) Role, Organization and Personnel
- Training and Policy Development
- Military Justice Proceedings: Trials, Appeals and Other Hearings

SECTION 2 — The DMP and the CMPS

Role of DMP

The DMP is appointed by the Minister of National Defence. The present DMP is Captain (Navy) John C. Maguire, who was appointed to a four year term on 19 September 2009.² Although, the DMP acts under the general supervision of the JAG, he is expected to exercise his duties and functions independently. Those duties and functions, which are set out in the *National Defence Act (NDA)*, the *QR&O*, ministerial orders and other agreements, include:

- ☐ Reviewing all *Code of Service Discipline* charges referred to him through the Canadian Forces (CF) chain of command and determining whether:
 - the charges or other charges founded on the evidence should be tried by court martial; or
 - the charges should be dealt with by an officer who has jurisdiction to try the accused by summary trial.

¹ Previous DMP Annual Reports, along with copies of DMP Policy Directives and other information can be found at the DMP website: <http://www.forces.gc.ca/jag/publications/index-eng.asp>

² His biography can be found at <http://www.forces.gc.ca/jag/office-cabinet/team-captm-maguire-eng.asp>

- ☐ Conducting — within Canada or at deployed locations overseas — the prosecution of all charges tried by court martial;
- ☐ Acting as appellate counsel for the Minister of National Defence on all appeals from courts martial or from the Court Martial Appeal Court (CMAC);
- ☐ Acting as the representative of the CF at all custody review hearings conducted before a military judge;
- ☐ Acting as the representative of the CF before other boards and tribunals whose jurisdiction touches upon matters relevant to the military justice system; and
- ☐ Providing legal advice to military police personnel assigned to the Canadian Forces National Investigation Service (CFNIS).

Organization of the CMPS

The DMP is assisted in his duties and functions by regular and reserve force legal officers appointed to act as military prosecutors, along with civilian paralegals and support staff. The service is organized regionally, and consists of:

- ☐ CMPS headquarters at National Defence Headquarters in Ottawa which, as of 31 March 2010 consisted of the DMP, two Deputy Directors of Military Prosecutions (DDMP), an appellate counsel, a prosecutor responsible for policy development, communications, and training, and a legal advisor working directly with the CFNIS;
- ☐ Regional Military Prosecutors' (RMP) offices, each with an establishment of two regular force prosecutors, located at:
 - Halifax, Nova Scotia (Atlantic Region),
 - Valcartier, Quebec (Eastern Region),
 - Ottawa, Ontario (Central Region), and
 - Edmonton, Alberta (Western Region); and
- ☐ Reserve force prosecutors located individually across Canada.

Given the geographic dispersal of the CMPS across Canada, effective communication is of vital importance to its operations. To ensure that prosecutors remain aware of the progress of individual disciplinary files, DMP updates and distributes several internal reports on a weekly basis. The DMP also convenes regular conference calls among the prosecutors and staff to provide direction and to discuss matters of common interest. Upon

the completion of each court martial, a summary sheet outlining the results of the case and the reasons provided by the military judge, is prepared and distributed to all other military prosecutors. The DMP and DDMPs maintain continuous individual contact with and oversight of military prosecutors and key civilian staff.

CMPS Personnel

During this reporting period, the CMPS experienced a number of personnel and position changes at CMPS headquarters. In July, the former appellate counsel was promoted from "acting" capacity to fill the second DDMP Lieutenant-Colonel position. In keeping with a recommendation of the 2008 Bronson Report,³ her replacement in the appellate counsel position was seconded to the Ministry of the Attorney General, Ontario's Ottawa Crown Attorney Office for the first 9 months of the reporting period to gain additional experience. As a result, the appellate counsel duties ended up having to be shared by the two DDMPs for the balance of the year. In addition, in the fall of 2009, a military prosecutor moved into the CFNIS headquarters to become the embedded legal advisor to the CFNIS. A new DDMP (Reserves) was also appointed in November 2009 following the retirement of the former DDMP (Reserves).

During the reporting period there were some significant personnel challenges in the RMP offices. For example,

- in September, one of two legal officers in Atlantic Region was deployed for six months as a deputy military criminal law advisor within the Rule of Law section of the United Nations Mission to the Democratic Republic of Congo;
- in November 2009, one of two legal officers in the Western Region was deployed for six months as a legal advisor to the Combined Security Transition Command in Afghanistan;
- in July 09, an experienced military prosecutor was replaced by a junior prosecutor in Eastern Region;

³ Bronson Consulting Group, *Review of the Canadian Military Prosecution Service*. The Bronson Report dated 31 March 2008 was authored by Andrejs Berzins, Q.C. and Malcolm Lindsay, Q.C., who have extensive experience in prosecutions and management. It was requested in 2007 by the previous DMP in order to determine ways to reduce delay at courts martial.

- in November 09, a military prosecutor who was under training was posted into the Central Region RMP Office; and.
- a lengthy General Court Martial — *R v. Wilcox* — tied up RMP Atlantic prosecutors for an extended period of time, including 57 “in court” days.

To help address the resulting personnel gaps, the remaining regular force military prosecutors were required to assume a heavier than normal case load. In addition, reservist CMPS members were called upon to help bridge the gap.⁴ At the same time, a recruiting drive in 2009 resulted in all vacant reserve RMP and DMP positions eventually being filled.

In terms of the civilian component of the CMPS, there were also some notable developments:

- Both the administrative assistant and the court martial paralegal took parental leave for a total of 11 months. Their positions were filled by individuals employed in an acting capacity.
- RMP Atlantic and RMP Central hired legal assistants indeterminately to resolve outstanding vacancies.
- RMP Western filled their legal assistant position in an acting capacity for a ten month period while the incumbent was on parental leave.

SECTION 3 — Training and Policy Development

Training

All regular force prosecutors are military legal officers who are posted to their positions for a limited period of time — usually three to five years. As such, the training that they receive must support both their current employment as prosecutors as well as their professional development as officers and military lawyers. The relative brevity of a military prosecutor’s posting with the CMPS requires a significant and ongoing organizational commitment to provide him or her with the formal training and practical experience necessary to develop the skills, knowledge and judgment essential in an effective prosecutor. This reality poses a significant challenge for the DMP leadership team as it seeks to ‘grow’ the organization.

⁴ For example regional Ontario Crown Attorney in Ontario commenced a two-year secondment as a military prosecutor in April 2009 on a reservist contract.

Given the small size of the CMPS, much of the required 'formal' training is provided by organizations external to the CF. During the present reporting period, CMPS members participated in conferences and continuing legal education programs organized by federal, provincial and territorial Heads of Prosecution, the Canadian Bar Association and its provincial affiliates, the Federation of Law Societies of Canada, the Ontario Crown Attorneys Association and various provincial law societies. These programs benefited the CF not only through the knowledge imparted and skills developed but also through the professional bonds forged by individual military prosecutors with their colleagues from the provincial and federal prosecution services.

In addition to the large on-the-job training component, the CMPS holds an annual workshop for all its Regular and Reserve Force prosecutors. The one day workshop is held as part of the annual JAG Continuing Legal Education (CLE) workshop. During this reporting period, both the JAG CLE and the CMPS Workshop had to be cancelled for budgetary reasons that were beyond the control of the DMP.

Military prosecutors also took part in a variety of other professional development activities, including the legal officer intermediate and advanced training programs, and the officer professional military education program. Finally, in order to maintain their readiness to deploy into a theatre of operations in support of both the DMP's and the JAG's mandate, military prosecutors conducted individual military skills training such as weapons familiarization and first aid training.

In September 2009 the newly appointed DMP attended the 36th Conference of the Federal, Provincial and Territorial Heads of Prosecutions Committee in Whitehorse, Yukon. The conference covered an array of topics related to prosecutions. Such conferences provide an opportunity for the various heads of prosecutions from across the country to exchange information and perspectives on topical issues and trends impacting the exercise of prosecutorial discretion; the management and administration of independent prosecution services in Canada; and the practice of criminal law.

A hardworking and highly motivated civilian support staff is an integral part of the CMPS team and provides an essential service to facilitate the carrying out of the DMP's various roles and responsibilities. As a result, significant efforts are also made to provide these individuals with training and experience that will enhance their value to CMPS and to the Department of National Defence, and simultaneously foster their job satisfaction.

CMPS also provides support to the training activities of other CF entities. During the present reporting period, this support included the mentoring and supervision by military prosecutors of a number of junior military lawyers from the Office of the Judge Advocate General who were required to complete a portion of their "on-the-job training" program by assisting in the prosecution at courts martial. Military prosecutors also provided presentations to JAG legal officers, military justice training to members of the CFNIS, served as supervisors for three law students articling with the Office of the JAG and acted as instructors during a week-long military justice Legal Officer Intermediate Training course.

Policy Development

In the previous fiscal year, in response to the Bronson Report, DMP completed a comprehensive review of all CMPS policies and procedures. Amended policies have been published while others are still under review. DMP is working with the CFPM to create a standardized disclosure package and within the past reporting period has assisted in the creation of an electronic pre-charge screening package that is now being provided by the CFNIS to all RMP offices across Canada.

Although there are indications that the adoption of these recommendations and policy amendments have already collectively produced positive results in reducing court martial delay, DMP was still working to adopt some additional recommendations from the Bronson Report that had yet to be implemented by the end of the reporting period. One notable recommendation included establishing additional RMP Offices in Esquimalt and Borden to better serve the CFNIS Detachments in those locations. This particular initiative, which was specifically addressed and supported in the 2009/2010 JAG Business Plan will, hopefully, be realized in 2011.

Finally, military prosecutors also play a role in the development of Canadian military justice and criminal justice policy. The DMP continues to play a strong role in such efforts through his participation on a committee made up of the heads of all federal, provincial and territorial prosecution services.

SECTION 4 — Military Justice Proceedings

The nature of the operational tasks entrusted to the CF requires the maintenance of a high degree of discipline among CF members. Parliament and the courts have long recognized the importance of a separate military

Code of Service Discipline to govern the conduct of individual soldiers, sailors and air force personnel and prescribe punishments for disciplinary breaches.

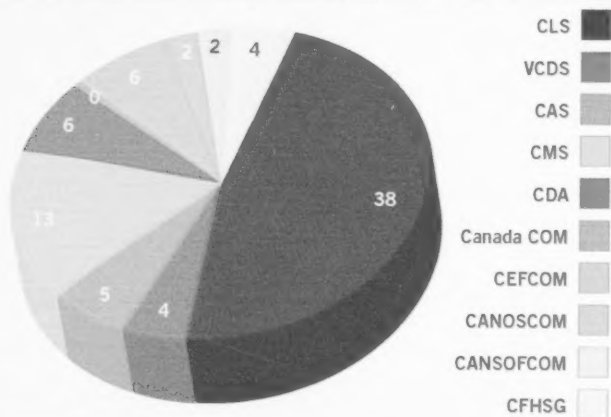
The *Code of Service Discipline* is designed to assist commanders in the promotion and maintenance of good order, high morale, efficiency, discipline and operational effectiveness. To these ends, the *National Defence Act* creates a structure of military tribunals as the ultimate means of enforcing discipline. Among these tribunals are the courts martial and the Court Martial Appeal Court (CMAC).

During the present reporting period, military prosecutors represented the interests of the CF and the general public in a number of different types of judicial proceedings related to the military justice system. These proceedings included courts martial, appeals from courts martial and reviews of pre-trial custody.

Courts Martial

During the reporting period, the DMP received 78 applications for disposal of a charge or charges from various referral authorities (see Figure 1).

FIGURE 1: REFERRALS BY COMMAND OF REFERRAL AUTHORITY⁵

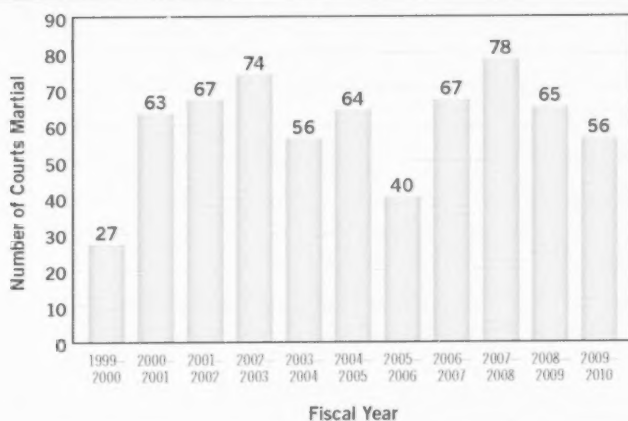


⁵ This data only includes referrals that have gone to court martial.

Following review by military prosecutors, charges were preferred to court martial in respect of 49 applications. In 8 of those cases, charges were withdrawn after they had been preferred but before trial. A decision not to prefer any charges was made in respect of 17 applications.

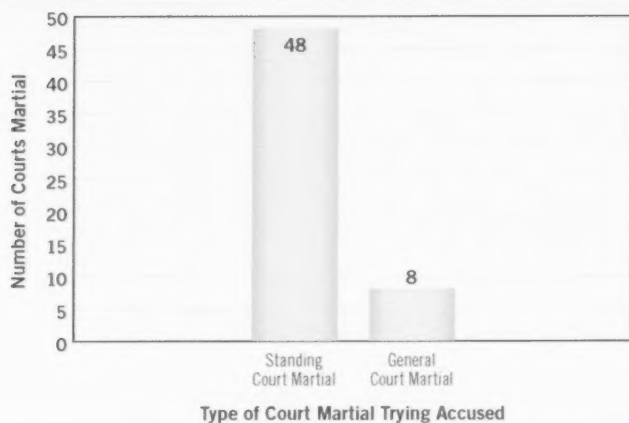
During the reporting period, a total of 181 charges were tried before 56 courts martial. An examination of the number of courts martial over the previous decade shows that the quantum was just slightly below the average of 60 (See Figure 2).

FIGURE 2: NUMBER OF COURTS MARTIAL COMPLETED

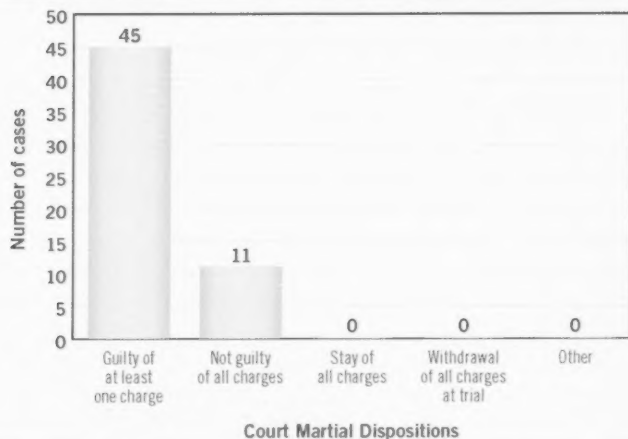


As of 31 March 2010, 6 courts martial had been convened but not yet commenced and charges in 16 cases had been preferred and were awaiting the assignment of a military judge and the convening of a court martial. This total of 22 cases awaiting completion compares to 35 cases awaiting completion on 31 March 2009 and represents a decrease of 37% from 2009 to 2010 and 58% from 2008 to 2009. However, the backlog of any number of cases awaiting trial is treated by CMPS as a matter of concern.

During the reporting period, 48 trials were held before a Standing Court Martial, composed of a military judge sitting alone as both trier of fact and trier of law. In addition, there were 8 trials held before a General Court Martial, composed of five CF members as triers of fact and a military judge as the trier of law (see Figure 3).

FIGURE 3: TYPE OF COURT MARTIAL TRYING ACCUSED

At the conclusion of 45 of the trials, the trier of fact made a finding of guilty in respect of at least one charge. The remaining 11 trials had not guilty findings on all charges. There were no instances where there was either a stay or a withdrawal of all charges (see Figure 4).

FIGURE 4: COURT MARTIAL DISPOSITIONS

Annexes A and B provide additional information regarding the charges tried and the results of each court martial.

At the beginning of a court martial, the military judge asks the accused to plead guilty or not guilty on each of the charges. The following table represents the proportion of courts martial where the accused pleaded guilty to at least one of the charges. (See Figure 5).

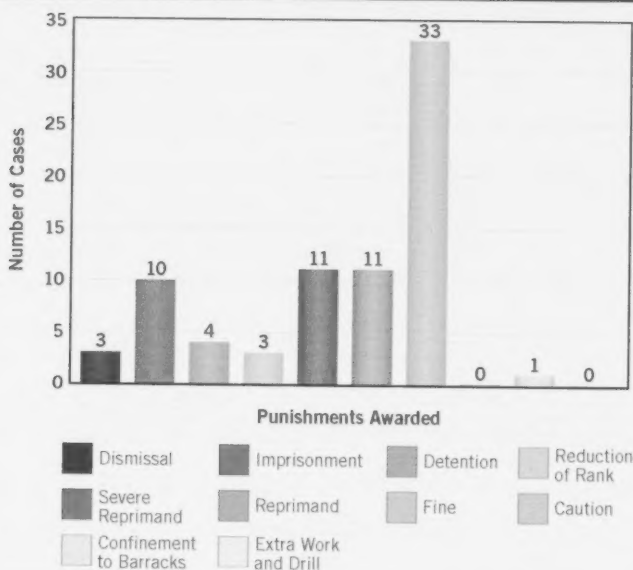
FIGURE 5: NATURE OF PLEA BY THE ACCUSED



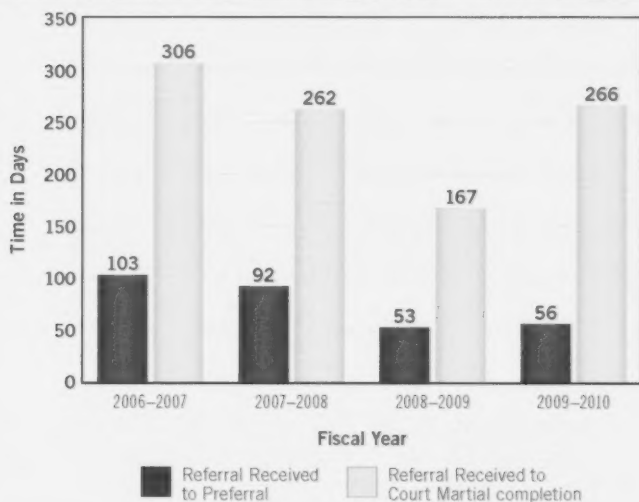
While only one sentence may be passed on an offender at a court martial, a sentence may involve more than one punishment. The 45 sentences pronounced by courts martial during the reporting period involved 76 punishments. A fine was the most common punishment, with 33 fines being imposed. Ten punishments of imprisonment and four punishments of detention were also imposed by the court of those 14, four were suspended sentences (see Figure 6).

Two applications for release pending appeal where a custodial sentence was imposed were made during the reporting period. One was granted by the presiding military judge, while one was denied. This decision was later reversed by the CMAC⁶.

⁶ *Wilcox v. R.*, [2009] C.M.A.J. No. 7.

FIGURE 6: PUNISHMENTS AWARDED

The reduction of delay in the military justice system continues to be an objective of the DMP. The previous years' initiative to reduce delay at courts martial included adopting a 30-day target from the time DMP receives a charge referral from the chain of command, to the completion of the post charge review by a military prosecutor. Recent data suggests that there was a decreasing general trend from 2006 to 2009 between the reception of an application for disposal of a charge and a decision taken. Conversely, in the 2009–2010 fiscal year, we observed an increase in the time taken from referral of charges to court martial completion, back to levels seen in 2007–2008; however times remained relatively constant from the previous year between referral of charges from the chain of command and their preferral by prosecutors to the Court Martial Administrator (CMA) for court martial (see Figure 7). It is noteworthy that the 2008–2009 numbers were impacted by the CMAC decision in *Trépanier v. R.*, following which courts martial ceased for several months until legislative amendments were made via Bill C-60.

FIGURE 7: HISTORICAL TRENDS IN COURT MARTIAL DELAY⁷

Appeals

At the beginning of the reporting period 11 appeals were ongoing, all of which had been initiated by members of the Canadian Forces who had been convicted and sentenced by court martial. During the reporting period, 10 appeals were initiated at the Court Martial Appeal Court (CMAC), one of them by the Crown and the remaining nine by convicted members. The Crown filed a cross-appeal in two of these cases. Of the 21 appeal cases, two were abandoned by the Appellant. The CMAC held oral hearings in respect of 10 of these appeals and rendered a decision in eight of them. The CMAC had yet to release a decision in five cases by the end of this reporting period. The remaining six cases before the CMAC had not yet been heard. Additionally, one notice of appeal and one application for leave to appeal were filed with the Supreme Court of Canada (SCC) both by convicted members whose appeals were denied at the CMAC. The SCC held an oral hearing in the appeal case

⁷ The statistics for "Referrals received to preferral" in fiscal year 2009/2010 only account for those referrals that have been received and preferred at the time of this report. It does not account for those cases that have been referred but have yet to be preferred.

but had not released its decision by the end of the reporting period, while the application for leave to appeal had not yet been decided.

Annex C provides additional information regarding the types of appeal and the progress of each appeal.

The following appeals cases are of particular interest because they either involved high profile matters or raised important issues in Canadian criminal or military law:

***LCol Szczerbaniwicz v. R.*⁸**

LCol Szczerbaniwicz was found guilty at court martial of assault contrary to s. 266 of the *Criminal Code*. The incident took place in Belgium, where he was then serving. During a visit from his wife, from whom he had recently separated, an argument took place. During the argument, Mrs. Szczerbaniwicz threw her husband's framed Master's degree certificate to the floor and was stomping on it. LCol Szczerbaniwicz grabbed her and swung her off the diploma, causing her to fall and suffer bruising.

LCol Szczerbaniwicz appealed the reasonableness of the verdict on the grounds that his right to cross-examine the complainant had been limited, that the Military Judge had inappropriately placed the burden on him to explain the manner in which the complainant was bruised, and that the Military Judge misconstrued the law and facts related to the defence of property and use of excessive force. A majority of the CMAc dismissed all three grounds of appeal. A judge dissented on the grounds that the Military Judge failed to properly apply the test from *R. v. D.(W.)* regarding reasonable doubt where there is conflicting testimony between the complainant and the accused and that the Military Judge failed to consider relevant facts concerning the statutory defence under subsection 39(1) of the *Criminal Code*, i.e., the defence of property.

LCol Szczerbaniwicz filed a notice of appeal with the SCC on 2 June 2009, in accordance with his statutory right of appeal under section 245(1)(a) of the *National Defence Act* respecting a question of law on which a judge at the CMAc dissents. The SCC heard the appeal on 8 February 2010. A decision had not been rendered as of the end of this reporting period.

⁸ *Szczerbaniwicz v. R.*, [2009] C.M.A.J. No. 4

MCpl Matusheskie v. R.⁹

MCpl Matusheskie was found guilty at court martial of disobedience of a lawful command contrary to section 83 of the *National Defence Act*. MCpl Matusheskie, a weapons technician, had been ordered not to install tactical latches on specific C-7 assault rifles, however he had also subsequently received a second conflicting order on the same subject.

MCpl Matusheskie appealed his conviction for disobedience of a lawful command. During the trial MCpl Matusheskie admitted that he had disobeyed an order given to him by his direct supervisor. However, he presented the defence that he received a subsequent conflicting order from outside his chain of command. The Military Judge believed the Appellant but required the Appellant to prove, on a balance of probabilities, that the subsequent order was a lawful order.

The Court Martial Appeal Court stated that a command is to be obeyed unless it is manifestly unlawful and that obedience to orders is the fundamental rule of military life. The CMAC found that the Military Judge could only require MCpl Matusheskie to prove the order was lawful if he concluded that the second order was manifestly unlawful.

Ex-Pte Tupper v. R.¹⁰

Ex-Pte Tupper was found guilty at court martial of six charges involving absence without leave, behaving with contempt toward a superior officer, disobeying a lawful command and resisting an escort whose duty it was to apprehend him. He was sentenced to dismissal and 90 days detention, and issued a seven-year weapons prohibition. Ex-Pte Tupper appealed the severity of the sentence and was released pending appeal. In June 2008, pending his appeal, Ex-Pte Tupper was administratively released from the Canadian Forces under item 2(a), Unsatisfactory Conduct.

At the CMAC, he argued that the Military Judge's sentencing reasons were inadequate and that the Military Judge failed to consider relevant mitigating circumstances such as his drug addiction or his attempts to obtain treatment. Although the majority rejected both grounds of appeal, they declared the punishments of dismissal and detention to be inoperative by reason of his

⁹ *Matusheskie v. R.*, [2009] C.M.A.J. No. 3

¹⁰ *Tupper v. R.*, [2009] C.M.A.J. No. 5

administrative release. A judge dissented on the grounds that the court had no basis for allowing the appeal in light of their finding that the sentence was neither too severe nor unfit.

***Cpl Wilcox v. R.*¹¹**

Cpl Wilcox was convicted of criminal negligence causing death contrary to s. 220(a) of the *Criminal Code* and negligent performance of a military duty contrary to s. 124 of the *National Defence Act* and sentenced to four years imprisonment and dismissal from the Canadian Forces. Following his trial Cpl Wilcox made an application to the Military Judge to be released from custody pending the resolution of his appeal on the legality of the finding, legality of the sentence, and severity of the sentence. The Military Judge denied the application.

Cpl Wilcox filed an application to the Court Martial Appeal Court to have the Military Judge's decision to deny his release overturned. The Court Martial Appeal Court found that the Court Martial judge did not have the authority to consider the grounds of appeal in his decision while the CMAC did have this authority. The CMAC also found that the Military Judge failed to weigh the seriousness of the offence against the circumstances of the accused and that the dismissal from the CF mitigated the CF interest of having Cpl Wilcox retained in custody. The CMAC released Cpl Wilcox from custody pending the resolution of his appeal.

***Capt Savaria v. R.*¹²**

Capt Savaria was found guilty at court martial of an offence under section 130 of the *National Defence Act* for forging false documents contrary to section 367 of the *Criminal Code*. After a military doctor complained to the Military Police that her signature had been forged on a document held in Capt Savaria's medical records, the Military Police obtained portions of Capt Savaria's medical file through a request made under section 8(2)(c) of the *Privacy Act*. Based on the information obtained through that request and the information provided by the military doctor, the Military Police officer then obtained a search warrant for the remainder of the file. An examination of the seized documents allowed an expert in handwriting to determine that Capt Savaria had indeed falsified some of the documents.

¹¹ *Wilcox v. R.*, [2009] C.M.A.J. No. 7

¹² *Savaria v. R.*, 2010 CMAC 1

At the CMAC, Capt Savaria argued that the communication of his medical file to the Military Police pursuant to section 8(2)(e) of the *Privacy Act* was illegal and that the resulting search was abusive. The CMAC dismissed the appeal, noting that section 8(2)(e) of the *Privacy Act* exists to assist the investigation of crimes committed against the state in precisely these types of circumstances and that the Appellant did not have a reasonable expectation of privacy with respect to documents that he had falsified. On 23 March 2010, Capt Savaria filed an application for leave to appeal with the SCC.

Other Hearings

Custody Reviews

Military judges are, in certain circumstances, required to review orders made to retain a CF member in service custody. DMP may represent the interest of the CF at such hearings. During the reporting period, military prosecutors appeared at one pre-trial custody review hearing. In this case, the person in custody remained in custody.

Conclusion — DMP Comments

This has been a year of challenges and progress for the military justice system. This was a year where we continued to maintain gains in terms of timelines from referral to preferral. The reasons for this progress are numerous but primary among them are the adoption and implementation of many of the recommendations made in the Bronson Report and the hard work and dedication shown by all members of the CMPS team in implementing them. At the same time some regression in the timelines between referral and court martial completion was noted. Options to improve trial scheduling processes are being assessed in hopes of identifying ways to improve the situation. It is also the intention of DMP to persist in pressing the previous initiatives to reduce court martial that were identified in prior DMP Annual Reports.

Recent policy development to provide more authority to front line prosecutors with respect to charging documentation and decisions and sentencing approval has both empowered CMPS team members and improved overall morale in the organization. Further, these measures have expedited the screening and negotiation processes allowing for some reduction in delay.

I continue to stress the need to actively develop military prosecutors' skills through targeted professional development initiatives, secondments, deployments and direct mentoring. This investment in our people is assisting to reduce delay, improve overall efficiency, and provide for adequate succession planning. In addition, I am committed to work with the Office of the JAG to retain legal officers in the CMPS for up to five years whenever it is reasonable to do so as a means of reducing prosecutorial turnover. This should help build the core competencies of our prosecutors and assist this relatively new organization to grow in maturity as it enters its second decade of existence, in a way that will better serve the interests of military justice and promote fair trial outcomes.

Overall, I am pleased with the achievements of the CMPS during the reporting period. My predecessor, Captain (Navy) Holly MacDougall, is to be commended for her leadership of the CMPS during the first half of this reporting period. Like her, I am very proud of the small yet remarkable CMPS team of civilian employees and military members. They displayed high levels of skill, dedication and professionalism this year — including under some very trying circumstances. We are all looking forward to overcoming new and existing challenges in discharging our unique prosecutorial roles and functions under Canada's *Code of Service Discipline* in the upcoming year.

ANNEX C | Annex A

	Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
1	SCM	MCpl Bolter	s. 90 (a) NDA s. 114 NDA s. 129 NDA s. 130 NDA (s. 334 Cr. C.)	Absent Without Leave Stealing An Act to the Prejudice Theft over \$5,000	Guilty Guilty Guilty Stayed	14 days detention Reduction in rank, severe reprimand and \$2,500 fine.	N/A	Edmonton, Alberta	CFB Edmonton	CLS	English
2	SCM	Lt(N) Price	s. 114 NDA	Stealing	Guilty		N/A	Halifax, NS	HMCS Goose Bay Halifax	CMS	English
3	GCM	Cpl Richard	s. 129 NDA s. 130 NDA (s. 163.1(4) (b) Cr. C.)	Neglect to the Prejudice Possession of Child Pornography	Guilty Not Guilty	\$200 fine	N/A	Gagetown, NB	Kandahar, Afghanistan	CLS	English
4	SCM	Pte Wilkins	s. 130 NDA (s. 163.1(4.1) (b) Cr. C.)	Pornography Accessing Child Pornography	Not Guilty	N/A	N/A	Shilo, MB	Wainwright, Alberta	CLS	English

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
5	SCM Cpl Venator	s. 130 NDA (s. 4(1) CDSA)	Possession of Substances	Guilty	6 months imprisonment and \$1,000 fine	N/A	Gagetown, NB	Oranochlo, NB	CLS	English
		s. 130 NDA (s. 4(1) CDSA)	Possession of Substances	Guilty						
		s. 130 NDA (s. 4(1) CDSA)	Possession of Substances	Guilty						
6	SCM Ex-Ple Destrosiers	s. 129 NDA	Conduct to the Prejudice	Withdrawn	30 days imprisonment (suspended)	N/A	Valcartier, QC	Quebec, QC	CLS	French
		s. 114 NDA	Stealing	Withdrawn						
		s. 130 NDA (s. 733.1 Cr. C.)	Failure to Comply with a Probation Order	Withdrawn						
		s. 130 NDA (s. 733.1 Cr. C.)	Failure to Comply with a Probation Order	Withdrawn						
		s. 114 NDA	Stealing	Withdrawn						

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
6	SOM Ex-Pte Desrosiers	s. 117(f) NDA	An Act of a Fraudulent Nature	Withdrawn						
		s. 114 NDA	Stealing	Withdrawn						
		s. 117(f) NDA	An Act of a Fraudulent Nature	Withdrawn						
		s. 114 NDA	Stealing	Withdrawn						
		s. 117(f) NDA	An Act of a Fraudulent Nature	Withdrawn	30 days imprisonment (suspended)	N/A	Valcartier, QC	Quebec, QC	CLS	French
		s. 129 NDA	Conduct to the Prejudice	Guilty						
		s. 129 NDA	Conduct to the Prejudice	Guilty						
		s. 130 NDA (s. 733.1 Cr. C.)	Failure to Comply with Probation Order	Withdrawn						

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
6	SCM Ex-Pte Desrosiers	s. 90 NDA	Absent Without Leave	Guilty						
		s. 101.1 NDA	Failure to Comply with Conditions	Guilty						
		s. 101.1 NDA	Failure to Comply with Conditions	Withdrawn						
		s. 83 NDA	Disobeyed a Lawful Command	Withdrawn	30 days imprisonment (suspended)	N/A	Valcartier, QC	Quebec, QC	CLS	French
		s. 129 NDA	An Act to the Prejudice	Guilty						
		s. 130 NDA (s. 430(1)(d) Cr. C.)	Mischief	Withdrawn						
		s. 130 NDA (s. 733.1 Cr. C.)	Failure to Comply with Probation Order	Withdrawn						

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
6	SCM	Ex-Pte Desrosiers	Willful s. 116(a) NDA Destruction of Property	Guilty						
			Failure to s. 130 NDA Comply with Probation Order	Withdrawn						
			Absent Without Leave s. 90 NDA	Guilty	30 days imprisonment (suspended)	N/A	Valcartier, QC	Quebec, QC	CLS	French
			Absent Without Leave s. 90 NDA	Guilty						
			Failure to s. 101.1 NDA Comply with Conditions	Guilty						
			Fraud on the Government s. 130 NDA (s. 121(1)(C) Cr. C.)	Guilty	Severe reprimand and \$2,000 fine	N/A	Valcartier, QC	Mexico	CLS	French
7	GCM	WO Tourville	Fraud on the Government s. 130 NDA (s. 121(1)(C) Cr. C.)	Guilty						

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
7	GCM	WO Tourville	s. 130 NDA (s. 380(1) (b)(ii) Cr. C.)	Fraud	Guilty	Severe reprimand and \$2,000 fine	N/A	Valcartier, QC	CLS	French
			Disobeyed a Lawful Command	Withdrawn						
8	SCM	Ex-Sgt Finstad	s. 83 NDA	An Act to the Prejudice Willfully made a False Statement	Guilty	\$200 fine	N/A	Saskatoon, SK	ADM(IM)	English
			s. 129 NDA	While a Sentry, Slept	Withdrawn					
			s. 125 NDA	Neglect to the Prejudice	Not Guilty					
			s. 75(h) NDA	While a Sentry, Slept	Not Guilty					
			s. 129 NDA	Neglect to the Prejudice	Not Guilty					
9	GCM	Sgt Swaby	s. 75(h) NDA	While a Sentry, Slept	Not Guilty	N/A	N/A	Toronto, ON	CLS	English
			s. 129 NDA	Neglect to the Prejudice	Not Guilty			KAF, Afghanistan		

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
9	GCM	Sgt Swaby	While a Sentry, Slept	Not Guilty	N/A	N/A	Toronto, ON	KAF, Afghanistan	CLS	English
			Neglect to the Prejudice	Not Guilty						
			Making a False Statement in Writing	Guilty						
10	SCM	A/SLI Ward	s. 75(h) NDA	Not Guilty	Reprimand and \$1500 fine	N/A	Esquimalt, BC	Esquimalt, B.C.	CMS	English
			s. 129 NDA	Not Guilty						
			s. 130 NDA (s. 362(1) (c) Cr. C.)	Guilty						
11	SCM	Cpl Liwji	s. 130 NDA (s. 367 Cr. C.)	Stay	Reprimand and \$1500 fine	N/A	Esquimalt, BC	Esquimalt, B.C.	CMS	English
			Uttering a Forged Document	Stay						
			s. 130 NDA (s. 368 Cr. C.)	Guilty						
11	SCM	Cpl Liwji	Disobeyed a Lawful Command	Guilty	Reprimand and \$750 fine	N/A	Shilo, MB	Shilo, MB	CLS	English
			s. 83 NDA	Guilty						
			Disobeyed a Lawful Command	Guilty						

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
12	Pte Bridger	s. 130 NDA (s. 140 Cr. C.)	Public Mischief	Guilty	30 days detention (suspended)	N/A	Pelawawa, ON	Pelawawa, ON	CLS	English
		s. 96(a) NDA	Making False Accusations	Guilty						
		s. 114 NDA	Stealing	Stay						
		s. 130 NDA								
		(s. 380(1) Cr. C.)	Fraud	Guilty						
13	Ex-MCpl Dickson	s. 117(f) NDA	An Act of a Fraudulent Nature	Withdrawn						
		s. 117(f) NDA	An Act of a Fraudulent Nature	Withdrawn	21 days imprisonment (suspended), reduction in rank, \$8000 fine	N/A	Cold Lake, Alberta	Cold Lake, Alberta	CAS	English
		s. 117(f) NDA	An Act of a Fraudulent Nature	Withdrawn						
		s. 117(f) NDA	An Act of a Fraudulent Nature	Withdrawn						
		s. 117(f) NDA	An Act of a Fraudulent Nature	Withdrawn						

	Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
14	SCM	MCpl Crépeau	s. 130 NDA (s. 264.1(1) (a) Cr. C.)	Uttering Threats	Guilty	Reprimand and \$4,000 fine	N/A	Laval, QC	Kabul, Afghanistan	CLS	French
			s. 130 NDA (s. 264.1 Cr. C.)	Criminal Harassment	Withdrawn						
15	SCM	Pte Weir	s. 130 NDA (s. 271 Cr. C.)	Sexual Assault	Not Guilty	N/A	N/A	Edmonton, Alberta	Lancaster Park, AB	CLS	English
			s. 97 NDA	Drunkenness	Guilty						
			s. 130 NDA (s. 270 Cr. C.)	Assaulting a Peace Officer	Guilty						
			s. 86 NDA	Quarrels and Disturbances	Stayed						
16	SCM	Cpl McGinnis- Armstrong	s. 130 NDA (s. 430 Cr. C.)	Mischief	Withdrawn	7 days detention	N/A	Greenwood, NS	Wainwright, Alberta	CLS	English
			s. 116(a) NDA	Wilful Destruction of Property	Withdrawn						
			s. 130 NDA (s. 430 Cr. C.)	Mischief	Withdrawn						

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
16	SCM	Cpl McGinnis-Armstrong	Wilful s. 116(a) NDA Destruction of Property	Withdrawn						
			Mischief s. 130 NDA (s. 430 Cr. C.)	Withdrawn	7 days detention	N/A	Greenwood, NS	Wainwright, Alberta	CLS	English
			Wilful s. 116(b) NDA Destruction of Property	Withdrawn						
			Mischief s. 130 NDA (s. 430 Cr. C.)	Withdrawn						
17	SCM	Pte Sterread	Uttering Threats s. 130 NDA (s. 264.1 Cr. Code)	Guilty	Reprimand and \$500 fine	N/A	Toronto, ON	Borden, ON	CLS	English
			Assault s. 130 NDA (s. 266 Cr. C.)	Stayed						
18	SCM	Cpl Harris	Quarrels and Disturbances s. 86 NDA	Guilty	\$200 fine and 5 days confinement	N/A	Gagetown, ON	Borden, ON	CLS	English
			Quarrels and Disturbances s. 86 NDA	Withdrawn						

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
19	SCM	Cpl Clark	s. 130 NDA (s. 253(1)(a) Cr. C.) Operating a Motor Vehicle While Impaired	Withdrawn	Severe reprimand and \$2000 fine	N/A	Calgary, Alberta	Kandahar, Afghanistan	CLS	English
20	SCM	Pte Blanchard	s. 97 NDA Drunkenness	Guilty						
21	SCM	Ex-Pte Nieuwendorp	s. 90 NDA Absent without Leave	Guilty	5 days detention and \$1,500 fine	N/A	Edmonton, Alberta	Edmonton, Alberta	CLS	English
22	SCM	Cpl Lumb	s. 130 NDA Uttering Threats	Not Guilty	N/A	N/A	Victoria, BC	Esquimalt, B.C.	CMS	English
23	SCM	Cpl Wells	s. 130 NDA (s. 5(1) COSA) Trafficking	Guilty	4 months imprisonment	N/A	Pelawawa, ON	Borden, ON	CLS	English
24	SCM	OS Welsh	s. 129 NDA Conduct to the Prejudice	Guilty	Severe reprimand and \$2,000 fine	N/A	Borden, ON	Borden, ON	CMP	English
			s. 97 NDA Drunkenness	Withdrawn						
			s. 130 NDA (s. 256 Cr. C.) Assault	Stayed	Severe reprimand and \$2,500 fine	N/A	Halifax, NS	Mediterranean Sea	CMS	English
			s. 93 NDA Behaved in a Disgraceful Manner	Guilty						

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
25	SCM	Sgt McLaren	Desertion Absent Without Leave s. 88 NDA s. 90 NDA s. 130 NDA (s. 86(1) Cr. C.)	Stayed Guilty Not Guilty	Reduction in rank to Corporal	N/A	Aldershot, Kentville, N.S.	Aldershot, Kentville, N.S.	CLS	English
26	GCM	Cpl Strong	Careless Use of a Firearm Disobeyed a Lawful Command s. 83 NDA s. 129 NDA	Not Guilty Not Guilty Not Guilty	N/A	N/A	Trenton, ON	Khandahar, Afghanistan	CAS	English
27	SCM	Pte Cross	An Act to the Prejudice Sexual Assault s. 130 NDA (s. 271 Cr. C.) s. 130 NDA (s. 271 Cr. C.) Sexual Assault s. 130 NDA (s. 173(1)(a) Cr. C.)	Not Guilty Not Guilty Withdrawn Withdrawn	N/A	N/A	Winnipeg, MB	Winnipeg, MB	CAS	English
28	SCM	Ex-WO Deschamps	Behaved in a Disgraceful Conduct to the Prejudice s. 93 NDA s. 129 NDA s. 129 NDA	Guilty Stayed Guilty	Reprimand and \$4,000 fine	N/A	Sherbrooke, QC	Sherbrooke, QC	CLS	French

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
29	GCM	Ex-Cpl Wilcox	Manslaughter While Using a Firearm	Stayed						
			Criminal Negligence Causing Death by Using a Firearm	Guilty	4 years imprisonment and dismissal from CF	Weapon DNA	Sydney, NS	Kandahar, Afghanistan	CLS	English
			Negligently Performed a Military Duty Imposed on Him	Guilty						
30	SCM	OS Durante	Assault Causing Bodily Harm	Not Guilty	Severe Reprimand and \$2000 fine.	N/A	Halifax, NS	Norfolk, VA	CMS	English
			Quarrels and Disturbances	Guilty						
31	SCM	Ex-Pte Seifi	Sexual Assault Lesser	Not Guilty						
			Included Offence of Assault	Guilty	Reprimand and \$500 fine.					
			An Act to the Prejudice	Not Guilty		N/A	Toronto, ON	Borden, ON	CLS	English

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
32	SCM	A/SLt Palletier s. 130 NDA (s. 271 Cr. C.) s. 97 NDA s. 129 NDA s. 129NDA s. 130 NDA (s. 430(1)(c)) s. 97 NDA s. 130 NDA (s. 266(a))	Sexual Assault Drunkenness Conduct to the Prejudice Conduct to the Prejudice Mischief Drunkenness Assault	Not Guilty Not Guilty Not Guilty Guilty Stayed Guilty Withdrawn	N/A	N/A	Halifax, NS	Kingston, ON	CMP	French
33	SCM	Pte Billingsley s. 90 NDA s. 129NDA s. 97 NDA s. 83 NDA	Absent Without Leave Conduct to the Prejudice Drunkenness Disobeyed a Lawful Command	Guilty Guilty Guilty Guilty	21 days imprisonment and dismissal	N/A	Gagetown, NB	Gagetown, NB	CLS	English

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
33	SCM	Pte Billingsley	Behaved with Contempt Toward a Superior Officer	Guilty	21 days imprisonment and dismissal	N/A	Gagetown, NB	Gagetown, NB	CLS	English
			s. 85 NDA							
			Quarrels and Disturbances	Stayed						
			s. 86 NDA							
			Absent Without Leave	Guilty						
			s. 90 NDA							
			Absent Without Leave	Guilty						
33	SCM	Pte Billingsley	Failure to Comply with Conditions	Guilty	21 days imprisonment and dismissal	N/A	Gagetown, NB	Gagetown, NB	CLS	English
			s. 101.1 NDA							
			Failure to Comply with Conditions	Guilty						
33	SCM	Pte Billingsley	Failure to Comply with Conditions	Withdrawn	21 days imprisonment and dismissal	N/A	Gagetown, NB	Gagetown, NB	CLS	English
			s. 101.1 NDA							
33	SCM	Pte Billingsley	Failure to Comply with Conditions	Guilty	21 days imprisonment and dismissal	N/A	Gagetown, NB	Gagetown, NB	CLS	English
			s. 101.1 NDA							

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
34	SCM	Cpl McDougall	Negligent Performance of Military Duty Neglect to the Prejudice	Stayed Guilty	\$300 fine	N/A	Cold Lake, Alberta	Cold Lake, Alberta	CAS	English
35	SCM	Ex-P01 McDougall	s. 124 NDA s. 129 NDA s. 130 NDA (s. 271 Cr.C.) s. 130 NDA (s. 5(1) CDSA) s. 130 NDA (s. 5(1) CDSA) s. 130 NDA (s. 5(1) CDSA)	Sexual Assault Not Guilty Guilty Guilty Guilty	N/A	N/A	Trenton, ON	Bayley's Bay, BM	CAS	English
36	SCM	Ex-Cpl Beek	s. 130 NDA (s. 5(1) CDSA) s. 130 NDA (s. 5(1) CDSA) s. 130 NDA (s. 5(1) CDSA) s. 130 NDA (s. 5(1) CDSA) s. 130 NDA (s. 5(1) CDSA)	Trafficking Guilty Guilty Guilty Guilty	9 months imprisonment	N/A	Edmonton, Alberta	Edmonton, Alberta	CLS	English

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
37	SCM	MS Boyle	Behaved in a Disgraceful Manner	Not Guilty	N/A	N/A	Esquimalt, BC	HMCS Nanaimo	CMS	English
		s. 93 NDA	An Act to the Prejudice	Not Guilty						
		s. 129 NDA	Disobeyed a Lawful Command	Stayed	Reprimand and \$2000 fine					
38	SCM	LS Donnelly	Absent Without Leave	Guilty		N/A	Halifax, NS	Halifax, NS	CMS	English
		s. 90 NDA	Failed to Comply with Conditions	Guilty						
		s. 101.1 NDA	Failed to Appear Before a Service Tribunal	Stayed						
		s. 118.1 NDA	Absent Without Leave	Guilty	Dismissal	N/A	Gagetown, NB	Gagetown, NB	CLS	English
39	SCM	Pte Nicholson	Failed to Comply with Condition	Guilty						
		s. 90 NDA	Failed to Comply with Condition	Guilty						
		s. 101.1 NDA	Failed to Comply with Conditions	Guilty						
		s. 101.1 NDA								

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
40	SCM	s. 130 NDA (s. 271 Cr. C.)	Sexual Assault	Guilty of s. 266 Cr. Code	Reprimand and \$2000 fine	N/A	Borden, ON	Borden, ON	CMP	English
		s. 130 NDA (s. 271 Cr. C.)	Sexual Assault	Not Guilty						
		s. 129 NDA	Conduct to the Prejudice	Guilty						
		s. 130 NDA (s. 271 Cr. C.)	Sexual Assault	Stayed						
41	SCM	s. 95 NDA	Ill-treatment of a Subordinate	Guilty	Severe reprimand and \$3000 fine	N/A	Moncton, NB	Moncton, NB	CLS	French
		s. 130 NDA (s. 271 Cr. C.)	Sexual Assault	Stayed						
		s. 95 NDA	Ill-treatment of a Subordinate	Guilty						
		s. 97 NDA	Drunkenness	Withdrawn						
42	SCM	s. 124 NDA	Negligent Performance of a Military Duty	Stayed	\$500 fine	N/A	Halifax, NS	HMCS PRESERVER	CMS	French
		s. 129 NDA	Neglect to the Prejudice	Guilty						

	Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
43	SCM	CPO2 Jackson	s. 97 NDA s. 97 NDA s. 129 NDA	Drunkenness Drunkenness Conduct to the Prejudice	Guilty Guilty Guilty	Severe reprimand and \$5000 fine	N/A	Halifax, NS	San Juan, Puerto Rico	CMS	English
44	SCM	Pte Meadus	S. 114 NDA s. 130 NDA (s. 367 Cr. C.) s. 130 NDA (s. 368 Cr. C.)	Stealing Forgery Uttering a Forged Document	Guilty Withdrawn Withdrawn	Reprimand and \$1000 fine	N/A	Esquimalt, BC	Victoria, BC	CMS	English
45	GCM	Cpl Leblanc	s. 130 NDA (s. 271 Cr. C.)	Sexual Assault	Guilty	20 months imprisonment	DNA SOR	Edmonton, Alberta	Edmonton, Alberta	CLS	English
46	GCM	LS Johnston	s. 130 NDA (s. 266 Cr. C.)	Assault	Not Guilty	N/A	N/A	Esquimalt, BC	Esquimalt, BC	CMS	English
47	SCM	MCpl Roche	s. 114 NDA	Stealing	Guilty	60 days imprisonment (suspended) and \$5000 fine	N/A	Kingston, ON	Kingston, ON	CLS	French
48	SCM	MCpl Roach	s. 95 NDA s. 116(b) NDA	Abuse of a Subordinate Wilful Destruction of Property	Guilty Guilty	Severe reprimand and \$3000 fine	N/A	Kingston, ON	Kingston, ON	CANOSCOM	English

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
49	SCM	CWO Babcock	Negligent Performance of a Military Duty	Stay	Reprimand and \$2000 fine	N/A	Gatineau, QC	Ottawa, ON	ADM(IM)	English
		s. 129 NDA	Conduct to the Prejudice	Guilty						
50	SCM	Pte Foo	Behaved in a Disgraceful Manner	Guilty	Reprimand and \$2500 fine	N/A	Meaford, ON	Meaford, ON	CLS	English
		s. 93 NDA	Drunkness	Guilty						
		s. 97 NDA	Possession of an Explosive Substance (s. 82(1) Cr. C.) Without Lawful Excuse	Withdrawn						
51	SCM	Pte Cole	Stealing	Guilty	\$600 fine	N/A	Gagetown, NB	Gagetown, NB	CMP	English
		s. 114 NDA	Acts to the Prejudice	Guilty						
		s. 129(1) NDA	Struck a Superior Officer	Guilty	Severe reprimand and \$2500 fine	N/A	Gagetown, NB	Gagetown, NB	CLS	English
52	GCM	Capt Plourde								
		s. 84 NDA								

Type	Rank	Offences	Description	Disposition	Sentence	Orders at CM	Location of Court Martial	Location of Offence	Command	Language of Trial
53	SCM	Cpl Mleinek s. 130 NDA (s. 264.1(1)(a) Cr. C.)	Uttering Threats	Not Guilty	N/A	N/A	Edmonton, Alberta	Edmonton, Alberta	CLS	English
		s. 130 NDA (s. 153(1)(a) Cr. C.)	Sexual Exploitation	Not Guilty						
		s. 93 NDA	Behaved in a Disgraceful Manner	Not Guilty	Severe reprimand and \$2000 fine					
54	SCM	2Lt Mahaney s. 130 NDA (s. 153(1)(a) Cr. C.)	Sexual Exploitation	Stayed		N/A	Halifax, NS	Greenwood, NS	CLS	English
		s. 93 NDA	Behaved in a Disgraceful Manner	Guilty						
55	SCM	Ex-Cpl Martel s. 130 NDA (s. 271 Cr. C.)	Sexual Assault	Withdrawn	3 months imprisonment	DNA SOFA	Valcartier, QC	Shilo, MB	CLS	French
		s. 130 NDA (s. 271 Cr. C.)	Sexual Interference	Guilty						
56	SCM	Pte Leblanc s. 124 NDA	Negligent Performance of a Military Duty	Guilty	\$500 fine	N/A	Bagotville, QC	Bagotville, QC	CAS	French

ANNEX C | Annex B*Disposition by Court Martial*

	2009-2010	
	#	%
Guilty of at least one charge	45	80%
Not guilty of any charges	11	20%
Stay of Proceedings	0	0
Withdrawal of all charges	0	0
Other (NDA section 202.12)	0	0
Total	56	100%

Sentences

Punishment Type	2009-2010	
	#	%
Dismissal	3	4%
Imprisonment	10	13%
Detention	4	5%
Reduction in Rank	3	4%
Severe Reprimand	11	15%
Reprimand	11	15%
Fine	33	43%
Confined to Barracks	1	1%
Extra Work and Drill	0	0
Caution	0	0
Total	76	100%

Language of Trial

	2009-2010	
	#	%
Trial in English	46	82%
Trial in French	10	18%
Total	56	100%

Courts Martial by Command

	2009-2010	
	#	%
CLS	32	57
CMS	11	20
CAS	6	11
CANOSCOM	1	2
CMP	4	7
ADM(IM)	2	3
Total	56	100%

Courts Martial by Rank

	2009-2010		Reg F ¹³ Total %
	#	%	
Private and Corporal (Includes Master Corporal)	42	75%	57%
Sergeant to Chief Warrant Officer	9	16%	20%
Officer	5	9%	23%
Other	0	0	0
Total	56	100%	100%

Type of Court Martial

	2009-2010	
	#	%
Standing Court Martial	48	86%
General Court Martial	8	14%
Total	56	100%

¹³ The Regular Force (Reg F) column provides the percentages of each ranks group for the entire Reg F of the Canadian Forces as they were on 31 March 2010.

ANNEX C | Annex C

CMAC #	Appellant	Respondent	Type of Appeal	Result
508	Pte Tupper	Her Majesty the Queen	Severity of Sentence	Appeal Granted
512	MCpl Matusheskie	Her Majesty the Queen	Legality of Finding	Appeal Granted
513	LCol Szczerbanawicz	Her Majesty the Queen	Legality of Finding	Appeal Dismissed with dissent
515	Sgt Thompson (reduced to Cpl at trial level)	Her Majesty the Queen	Legality of Finding / Severity of Sentence	Appeal Granted
517	Pte St-Onge	Her Majesty the Queen	Legality of Finding / Severity of Sentence	Waiting for Decision
520	Cpl Mills T.J.	Her Majesty the Queen	Legality of Finding / Severity of Sentence	Appeal Dismissed
523	OS Lee	Her Majesty the Queen	Legality of Finding / Severity of Sentence	Waiting for Decision
524	LS Reid	Her Majesty the Queen	Severity of Sentence	Waiting for Decision
525	Capt Savaria	Her Majesty the Queen	Legality of Finding	Appeal Dismissed
526	LS Sinclair	Her Majesty the Queen	Severity of Sentence	Waiting for Decision
526	LS Sinclair	Her Majesty the Queen	Severity of Sentence	Waiting for Decision
527	PO1 Bradt	Her Majesty the Queen	Legality of Finding — Cross-appeal — Legality of Finding	Appeal Dismissed
528	Ex-OS Ellis	Her Majesty the Queen	Legality of Finding/Severity of Sentence	Waiting for Decision

(continued)

CMAC #	Appellant	Respondent	Type of Appeal	Result
530	Cpl Liwyj	Her Majesty the Queen	Legality of Finding / Severity of Sentence	Ongoing
532	MCpl Crépeau	Her Majesty the Queen	Legality of Sentence	Appeal Abandoned
533	Cpl Lumb	Her Majesty the Queen	Severity of Sentence	Appeal Abandoned
534	Cpl Wilcox	Her Majesty the Queen	Legality of Findings / Legality of the Sentence / Severity of the Sentence	Ongoing
535	Ex-Pte Seifi	Her Majesty the Queen	Legality of Finding — Cross-appeal Legality of Finding	Ongoing
536	Cpl Wilcox	Her Majesty the Queen	Application for Release Pending Appeal	Appeal Granted
537	Her Majesty the Queen	MS Boyle	Legality of Finding	Ongoing
538	Cpl Leblanc T.	Her Majesty the Queen	Legality of Finding / Legality of Sentence	Ongoing
539	Cpl Leblanc A.	Her Majesty the Queen	Legality of Finding	Ongoing
SCC File Number 33189	Ex-LCol Szczerbaniwicz	Her Majesty the Queen	Legality of Finding	Waiting for Decision
SCC File Number 33611	Capt Savaria	Her Majesty the Queen	Permission to appeal to SCC on legality of finding	Ongoing

ANNEX D

ANNUAL REPORT OF THE DIRECTOR OF DEFENCE COUNSEL SERVICES

Introduction

1. This annual report covers the period from 1 April 2009 to 31 March 2010. It is prepared in accordance with article 101.20 of the *Queens' Regulations and Orders for the Canadian Forces (QR&O)* which sets out the legal services which are prescribed to be performed by the Director of Defence Counsel Services (DDCS) and requires the DDCS to report annually to the Judge Advocate General (JAG) on the provision of these legal services and the performance of other duties undertaken in the furtherance of the DDCS mandate. The Director during this period was Lieutenant-Colonel Jean-Marie Dugas.

Role of DDCS and the Organization and Personnel of Defence Counsel Services (DCS)

Role of the DDCS

2. The DDCS is appointed by the Minister of National Defence under section 249.18 of the *National Defence Act (NDA)*. Although he acts under the general supervision of the JAG, he exercises his duties and functions independently and in a manner which is consistent with his responsibility to look to the individual interests of those who seek advice and representation from or through Defence Counsel Services. The DDCS provides, supervises and directs the provision of the following legal services, as set out in *QR&O* article 101.20:
 - legal advice to arrested or detained persons
 - legal counsel to an accused person where there are reasonable grounds to believe the accused person is unfit to stand trial
 - legal advice of a general nature to an assisting officer or an accused person on matters relating to summary trials
 - legal advice with respect to the making of an election to be tried by court martial
 - legal counsel for a hearing addressing pre-trial custody under subsection 159(1) of the *NDA*

- legal counsel to an accused person in respect of whom an application to refer charges to court martial has been made
- legal counsel to the respondent where the Minister appeals a finding or sentence or the severity of a sentence awarded by court martial
- legal counsel to an appellant with the approval of the Appeal Committee established under *QR&O* article 101.21
- legal advice to a person who is the subject of an investigation under the Code of Service Discipline, a summary investigation or a board of inquiry.

Organization and Personnel of DCS

3. During this reporting period the Office of DCS consisted of the Director and four other Regular Force legal officers working out of the Asticou Centre in Gatineau, Québec as well as five Reserve Force officers in private practice at various locations in New Brunswick, Québec and Ontario. The Reserve Force counsel have been active participants in the provision of legal services and the performance of the Defense Counsel Services (DCS) mandate.
4. Administrative support is provided by two clerical personnel occupying positions classified at the level of CR3 and CR5 as well as a paralegal who provides legal research services and administrative support for appeals.
5. Pursuant to section 249.2 of the *NDA* the Director of Defence Counsel Services acts under the general supervision of the JAG and the JAG may issue general instructions or guidelines in respect of Defence Counsel Services. However, during this reporting period no such general instructions or guidelines were issued.

Services and Activities

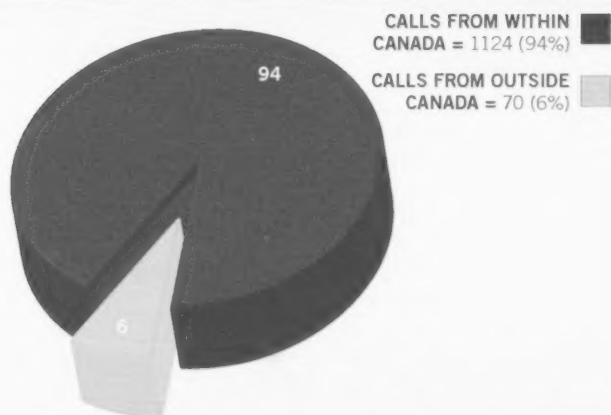
Professional Development

6. The National Criminal Law Program is the primary source of training in criminal law for defence counsel with DCS. In July 2009 four Regular Force lawyers attended this program. Additionally, counsel attended an annual two-day DCS in-house training program which dealt with a variety of issues including developments in criminal law, decisions of the Court Martial Appeal Court (CMAC) and modifications to the *NDA*.

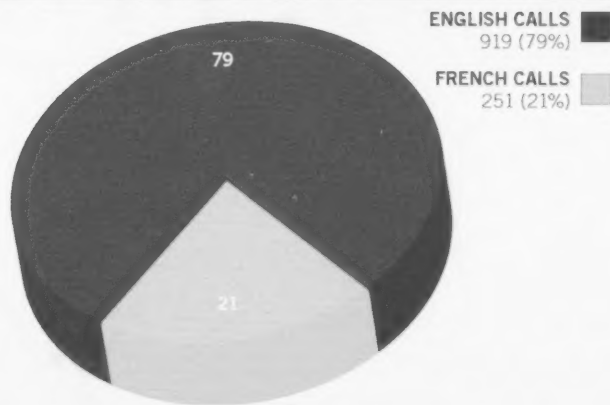
Duty Counsel Services

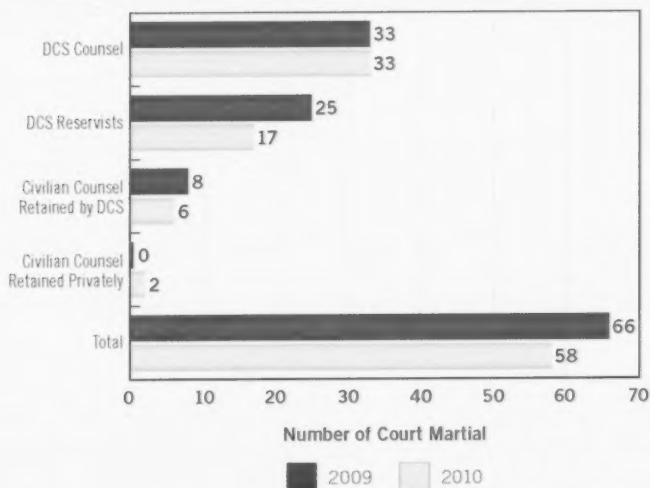
7. Bilingual service is available 24/7 to Canadian Forces (CF) members, as well as to others who are subject to the *Code of Service Discipline* while serving abroad. DCS counsel provide verbal and written communications through a toll-free number that is distributed throughout the CF as well as a CSN number and via email, the popularity of which is growing. Usage was generally as follows:
 - ▶ 1-800 access line to ensure availability of legal advice upon arrest or detention with the number provided to military police and other CF authorities likely to be involved in investigations of a disciplinary or criminal nature as well as being available on our website.
 - ▶ Standard direct telephone access, available to accused persons subject to the *Code of Service Discipline*, for advice in relation to an election between court martial and summary trial, questions on other disciplinary matters, or all other matters authorized under the *QR&O*.
 - ▶ Clients occasionally use email to initiate contact with DCS.
8. During the reporting period, DCS counsel handled 1194 calls. The calls ranged in duration but, on average, were approximately 14 minutes. This undertaking totalled more than 300 hours, similar to totals in previous years. The origin and language of the calls are illustrated in the following charts (Note: the total number of calls was 1194, but the chart for "Calls by Language" lists 1170. This discrepancy occurs because in some cases duty counsel failed to record the language used during the call):

CALLS BY ORIGIN



CALLS BY LANGUAGE



REPRESENTATION AT COURT MARTIAL*Court Martial Services*

9. When facing a court martial, an accused person has the right to be represented by DCS counsel at public expense, may retain legal counsel at his or her own expense, or may choose not to be represented.
10. Fifty-eight courts martial commenced during the reporting period, two of which were completed in the following fiscal year. Although this figure is less than the number of cases in the previous reporting period, it still placed considerable strain on the resources of this office. One case in particular, the General Court Martial of Captain Semrau, absorbed a significant proportion of DCS resources. In 33 of the cases commenced during this reporting period the accused was represented by Regular Force DCS officers and in 17 cases by Reserve Force DCS officers. Pursuant to the authority granted under subsection 249.21(2) of the *NDA*, the DDCS may hire, at public expense, civilian counsel in cases where, having received a request for representation by DCS counsel, no member of the DCS office can represent the particular individual, for example because of a conflict of interest, or because no suitable DCS officer is available. During the reporting period, civilian counsel hired by DCS appeared at six courts martial. Two accused were represented by civilian counsel at their own expense.

Appellate Services

11. Twenty-one appeals were before the CMAC at various points during the 2009–2010 reporting period. In all but one of those cases the appeal was filed by, or on behalf of, the member of the Canadian Forces. Eleven cases came from the previous fiscal year and the others were commenced during the current reporting period. Three of the cases have been subsequently abandoned by the appellant.
12. In the three cases in which an appeal or cross-appeal was entered by the prosecution, the respondent was automatically entitled to representation by DCS counsel. In one case the appellant commenced his proceedings with the assistance of civilian counsel and entirely without recourse to DCS. During this period, appellants submitted to the Appeal Committee, pursuant to *QR&O* subparagraph 101.20(2)(h), thirteen requests for representation by DCS. Of these thirteen requests, eleven were approved by the Appeal Committee, and two were awaiting decision at the conclusion of the reporting period.
13. Some sense of the issues and tenor of the appeals during this period is given in the cases delineated below:
 - **Sgt. Thompson, E.B.** (CMAC–515) Sgt Thompson was found guilty of two charges under section 129 of the *NDA* in relation to his involvement with a female private and a subsequent conversation he had with two other privates. On 12 June 2008 he appealed. The substance of the appeal was that the military judge erred in not granting his motion for abuse of process in relation to one of the charges and that the reduction in rank imposed as sentence was too severe. On 18 December 2009 the CMAC quashed the impugned charge as an abuse of process and reduced the sentence on the remaining conviction to a severe reprimand and a fine of \$2,500.
 - **Ex-Pte St-Onge, D.** (CMAC–517) On 26 June 2008, Ex-Pte St-Onge appealed the results of his court martial in which he had pled guilty to charges of possessing cannabis, using cannabis and methamphetamine, unauthorized possession of CF ammunition, and verbally threatening a superior. The grounds of appeal were based on the jurisdiction of the court and that the sentence of thirty days imprisonment was too severe. At the conclusion of the reporting period the appeal had not yet been heard.

- **MCpl Mills, T.J.** (CMAC-520) On 9 October 2008, MCpl Mills appealed his conviction for assault with a weapon on the basis that the judge had erred in failing to grant his motion that his right to be tried within a reasonable time had been breached by the 20 months post-charge delay. The appeal was heard on 27 November 2009 and was dismissed.
- **OS Lee** (CMAC-523) OS Lee was found guilty of trafficking cocaine. He appealed the finding of guilt on the basis that the Military Judge had failed, within the specific facts of this case, to instruct the panel properly as to the *mens rea* of the offence. He also appealed the severity of his sentence of five months imprisonment. The appeal was heard on 19 March 2010. At the conclusion of the reporting period the decision had not yet been rendered.
- **Capt Savaria, M** (CMAC-525) Capt Savaria was found guilty of having, at some time between the 3rd and 9th of October 2000, made false documents contrary to section 267 of the *Criminal Code*. The trial started on 30 October 2008 with the accused filing a motion pursuant to section 24(2) of the *Canadian Charter of Rights and Freedoms*, (*Charter*) requesting the exclusion of evidence for unreasonable search and seizure by the Military Police, contrary to section 8 of the *Charter*. The Military Judge dismissed the application, convicted the accused and sentenced the accused to a severe reprimand and a fine of \$3000. On 17 February 2009 Capt Savaria filed an appeal. On 29 January 2010 the CMAC unanimously rejected the appeal. On or about 24 March 2010, the applicant filed an application for leave to appeal to the Supreme Court of Canada. At the conclusion of this reporting period the decision on that application had not yet been issued.
- **LS Reid, S.** (CMAC-524) & **LS Sinclair, J** (CMAC-526) The appellants, then PO2 Reid and PO1 Sinclair, had plead guilty to wilfully damaging property of Her Majesty's Forces contrary to paragraph 116(a) of the *National Defence Act*. The property in question was a database icon then in use within the National Defence Operations Center. Both members were sentenced to a reduction in rank to leading seaman and to a fine of \$3,000. Their sentence appeal was heard and reserved on 12 March 2010. At the conclusion of this reporting period the decision had not been issued by the Court Martial Appeal Court.

- **P01 Bradt, B.P.** (CACM-527) On 31 March 2009 PO1 Bradt appealed his conviction on two charges of breach of public trust by a public officer. The Director of Military Prosecutions cross-appealed against acquittal on one charge of conduct to the prejudice of good order and discipline. The member had been sentenced to a severe reprimand and a fine of \$3,000. On 16 March 2010 both the appeal and cross-appeal were dismissed by the Court Martial Appeal Court.
- **Ex-OS Ellis, C.A.E.** (CMAC-528) On 21 April 2009 a notice of appeal was filed by Ex-OS Ellis. The appellant had pled guilty to two charges of trafficking cocaine and two charges of conduct to the prejudice of good order and discipline for cocaine use. He was sentenced to nine months imprisonment. Before trial, the accused had brought a motion under sections 7, 11(d) and 12 of the *Charter* challenging the constitutionality of the scale of punishments contained in section 139 of the *National Defence Act*. He appealed the severity of the sentence and the Military Judge's rejection of his *Charter* motion. The hearing was held on 26 March 2010 and the CMAC reserved its decision. At the conclusion of this reporting period the decision had not yet been promulgated.
- **LCol Szczerbaniwicz**, (CMAC-513) The appellant had been found guilty of common assault. On 17 April 2008 he filed a notice of appeal. On 5 May 2009 the Court Martial Appeal Court dismissed the appeal by a majority of two to one. The member appealed to the Supreme Court of Canada and the matter was heard on 2 June 2009. At the conclusion of this reporting period the decision was not yet issued.
- **Cpl Liwyj, A.E.** (CMAC-530) The appellant was found guilty of three offences of disobedience of a lawful command and was sentenced to a reprimand and a fine of \$750. The member filed a notice of appeal on 3 July 2009 in respect of both the conviction and sentence. At the conclusion of this reporting period the matter had not yet been heard.
- **Cpl Wilcox, M.A.** (CMAC-534) The appellant was found guilty, in the shooting death of a fellow soldier, of criminal negligence causing death, contrary to section 220 of the *Criminal Code*, and of negligent performance of a military duty, contrary to section 124 of the *National Defence Act*. He was sentenced to imprisonment for

a period of 48 months and to dismissal from Her Majesty's service. He filed a notice of appeal on 1 October 2009. At the conclusion of this reporting period the member's appeal had not yet been heard. However, the member was granted release from custody pending the resolution of his appeal.

- **MS Boyle, W.L.** (CMAC-537) MS Boyle was acquitted of one count of behaving in a disgraceful manner, contrary to section 93 of the *NDA* and one count of an act to the prejudice of good order and discipline contrary to section 129 of the *NDA* in relation to some apparent "horseplay" on board a ship. The Director of Military Prosecution filed a notice of appeal on 15 December 2009. At the conclusion of this reporting period the matter had not yet been heard.
- **Cpl Leblanc, T.** (CMAC-538) The appellant was found guilty of sexual assault pursuant to section 271 of the *Criminal Code*. He was sentenced to imprisonment for a period of 20 months. The trial started on 10 November 2009 with two pre-trial motions: a challenge to judicial independence and the impartiality of general courts martial under sections 7 and 11(d) of the *Charter*, and a challenge to the procedures for the selection of general courts martial panel members under sections 7, 11(d) and 15 of the *Charter*. The Military Judge dismissed the applications. On 22 January 2010 Cpl Leblanc filed a notice of appeal against the finding, the sentence and the pre-trial decisions of the judge. At the conclusion of this reporting period a hearing date had not yet been set.
- **Cpl Leblanc, A.** (CMAC-539) Cpl Leblanc was found guilty of negligently performing a military duty contrary to section 124 of the *National Defence Act* and was sentenced to a \$500 fine. Pre-trial motions under sections 7, 11(d) and 12 of the *Charter* challenging the constitutionality of the scale of punishments contained in section 139 of the *NDA* as well as the independence of the Military Judge were dismissed. On 5 March 2010, Cpl Leblanc filed a notice of appeal of the finding of guilt and of the military judge's decision with respect to his independence. At the conclusion of this reporting period a hearing date had not yet been set.

- **MCpl Matusheskie, C.A.** (CMAC-512) The member had been found guilty of disobedience of a lawful command in a situation where he had been given two conflicting orders, one by a Sergeant within his chain of command and a subsequent order by a Warrant Officer outside his chain of command. He brought the existence of the earlier order to the attention of the Warrant Officer and, in the face of persistent direction, followed the most recent order. The CMAC had no difficulty in finding that the Military Judge had erred in placing on the member the burden of proving that the order followed was lawful. They declined to order a new trial and acquitted the member.
- **Ex-Pte Tupper, R.J.** (CMAC-508) The 22 year old member with a drug dependency was found guilty of 6 charges arising out of his unauthorized departure from CFB Gagetown on two occasions and his uncooperative behavior upon arrest. He was sentenced to dismissal from the CF and 90 days detention. His appeal of both conviction and severity of sentence were dismissed. However, by the time of the hearing he had been administratively released from the CF and the CMAC found, with one judge dissenting, that military punishments of dismissal and detention were inoperative after the release of the member.

Ongoing Issues and Concerns

14. A number of areas of concern were noted during the reporting period.

DCS personnel and administrative support

15. Some issues raised in the "Bronson Report" into DCS remain outstanding. These are being analyzed and considered by our office, in conjunction with the appropriate representatives of the Office of the Judge Advocate General, with a view to finding a common approach and making reasonable advances in the delivery of Defence Counsel Services within the Canadian Forces.
16. An issue of some concern is the adequacy of the present facilities housing DCS at Asticou Centre. In this respect, the number of offices available to DCS in this location is inadequate and we are presently encroaching on the facilities of the Canadian Forces Language School to accommodate

our appeals paralegal. Further, the site offers inadequate room for file storage, is distant from our client base, JAG library resources and the military legal community. It offers limited informatics support and clearly functions as an impediment to the expansion of the office as we attempt to keep pace with the demand for services.

17. Further, with respect to personnel issues, the administrative assistant (CR-5) position requires re-evaluation and potential upgrading to an AS position to reflect the nature of the work performed. This will ensure a level of parity between that position and positions doing similar work within other organizations within the Canadian Forces so as to ensure continuity of staffing within the office and that DCS continues to be an attractive place for experienced staff to work.
18. At the conclusion of this reporting period one of our Reserve Force defence counsel positions remains unfilled. We currently have reserve counsel in New Brunswick, Québec, and Ontario. The DCS reserve bar is an important resource which has and continues to make a significant contribution to the realization of our mandate.

Court Martial Administrative Issues

19. The recent practice of scheduling courts martial to begin on Mondays rather than Tuesdays, as was the case for many years, does place an additional burden on defence counsel. Defence counsel almost invariably attend courts martial on temporary duty and it is necessary for defence counsel to arrive at the location of the trial at least one business day before trial in order to meet witnesses, receive final instructions from the client and to deal with any remaining pre-trial matters. For simple cases these matters could be dealt with on the day before trial and have traditionally been dealt with on Monday. However, with base functions largely closed on the weekends and witnesses often unavailable, the change requires that counsel routinely travel to trial the week prior to address these issues on Thursday or Friday and then wait through the weekend to commence trial on Monday. Defence counsel are disproportionately affected by these changes as prosecutors are posted throughout the country and often closer to home. Judges can simply fly out on Sunday. Defence counsel are constantly on the road and chronic weekends away from family can become a significant work-life balance issue.

20. *QR&O* article 112.66 requires that transcripts of all courts martial be prepared "as soon as practical after the proceedings of a court martial are terminated". These transcripts have been heavily relied on by counsel in the course of their work. There is a significant backlog in the preparation of transcripts such that access to them is not readily available to counsel in the course of their legal research or to address issues that were not subject to a published ruling or to place a decision of a Military Judge in its proper context. Additional resources need to be made available if we are to meet the spirit and the letter of this Governor in Council provision.

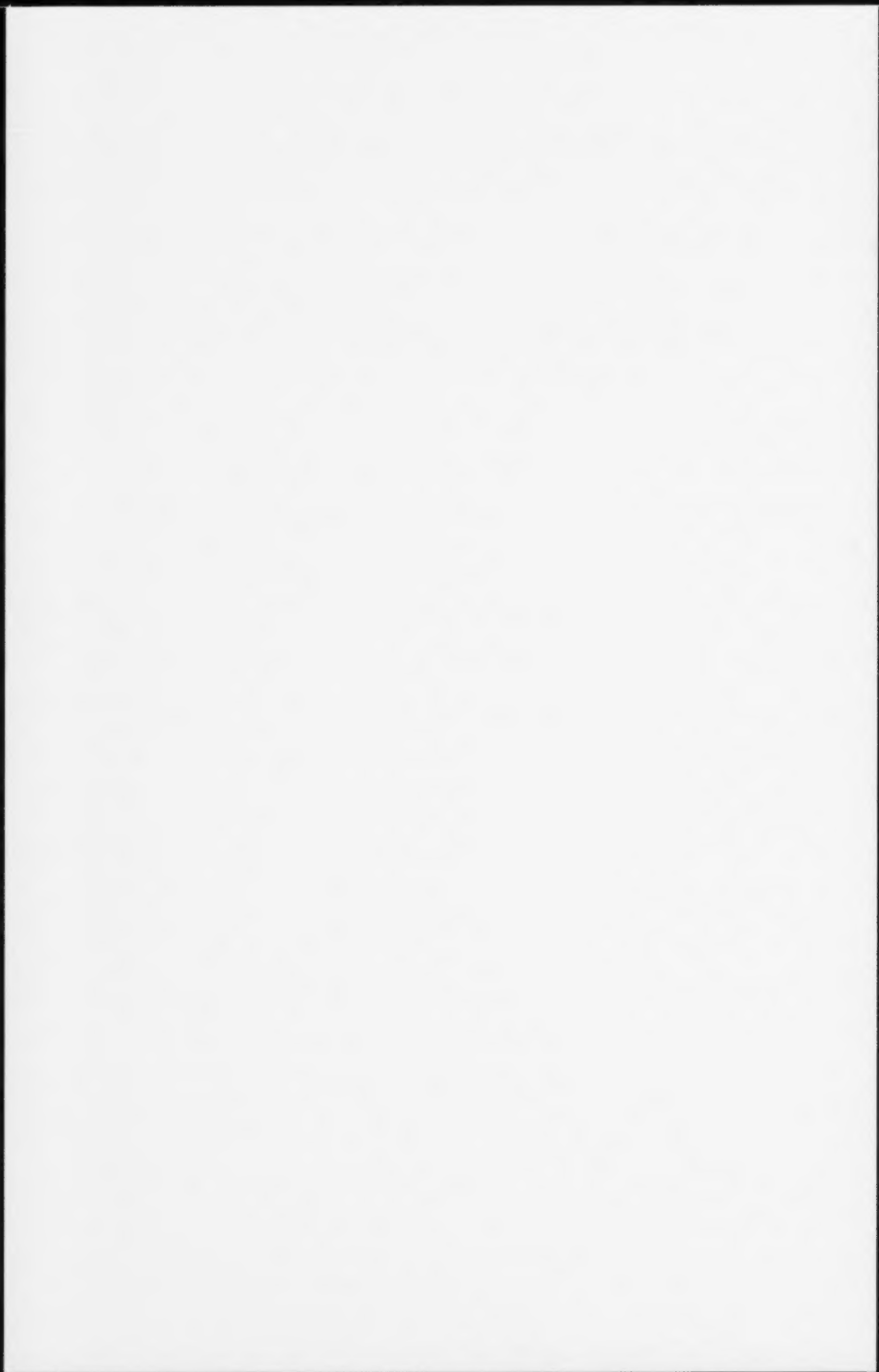
Systemic Military Justice Issues

21. As a result of providing 24/7 duty counsel service, DCS personnel are in a unique position to observe systemic issues affecting the military justice system. Following are two issues which I bring to your attention in your capacity as superintendent of the military justice system.
 - a. Custody Review Officers acting under *QR&O* article 105.22 sometimes impose onerous conditions that significantly restrict the liberty of members. These conditions may include reporting multiple times a day, even when the circumstances of the alleged offence for which the member was arrested would not appear to warrant such conditions. Such conditions can go on for days prior to summary trial and months should court martial be elected. Once signed, members have only a limited right of appeal to their Commanding Officer. In some cases members have been advised not to sign such conditions. This creates animosity between the member and his chain of command but forces the matter before a Military Judge. Military Justice would be enhanced by creating, from the conditions imposed by a Custody Review Officer, a right of appeal to a Military Judge.
 - b. DCS counsel frequently hear from deployed members who are charged with offences for which they have the right to elect trial by court martial and who have been told that, should they so elect, it will result in their immediate repatriation home. While an operational commander has the right to remove personnel from the theatre of operations, the mere fact of electing court martial would not normally place an additional burden on the chain of command as the normal pre-trial steps of referral, post-charge screening, preferral and trial preparation would not typically be accomplished within

the time frame of deployment. Representations that a member will be sent home if they exercise their right to court martial place a significant barrier between members of the CF and the Canadian standards of *Charter* compliant justice which our court martial system has been created to hold out to them.

Conclusion

22. This has been a busy and challenging period for defence counsel within DCS and, as in years past, our first priority has been to work with, and on behalf of, members of the Canadian Forces who are charged with service offences. Ours is the privilege of assisting them as they go through what can be a very difficult time in their career and in their lives. Many go on to have full military careers and to be solid members of the military community. For others, their charges represent a departure from service life and an opportunity to retake their place as productive members of Canadian civilian society.



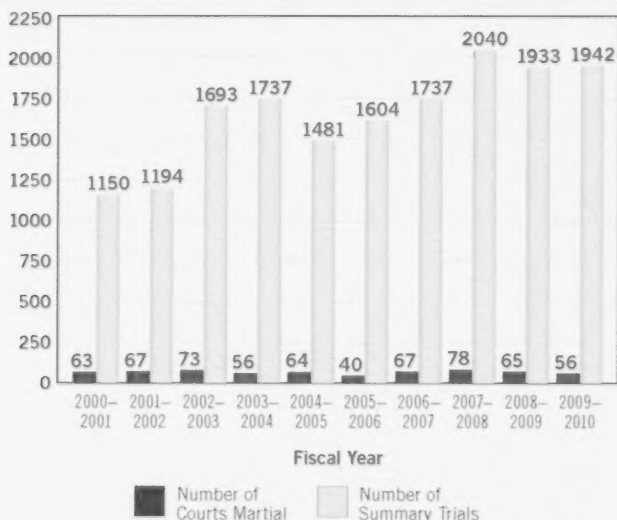
ANNEX E

SUMMARY TRIALS YEAR IN REVIEW — STATISTICS: 1 APRIL 2009 – 31 MARCH 2010

Distribution of Service Tribunals

	2008-2009		2009-2010	
	#	%	#	%
Number of courts martial	65	3	56	3
Number of summary trials	1933	97	1942	97
Total	1998	100	1998	100

DISTRIBUTION OF DISCIPLINARY PROCEEDINGS YEAR TO YEAR COMPARISON



Election to Court Martial

	2009-2010	
	#	%
Number of direct referrals to courts martial	78	3.80
Number of elections to be tried by courts martial by the accused	27	1.32
Number of summary trials	1942	94.59
Not proceeded with	6	0.29
Total	2053	100

Number of elections offered to be tried by courts martial	576	
Number of elections to be tried by courts martial by the accused		4.69

Language of Summary Trials

	2008-2009		2009-2010	
	#	%	#	%
Number in English	1536	79	1432	74
Number in French	397	21	510	26
Total	1933	100	1942	100

Note: (1) The statistics in this annex are current as of 6 July 2011.

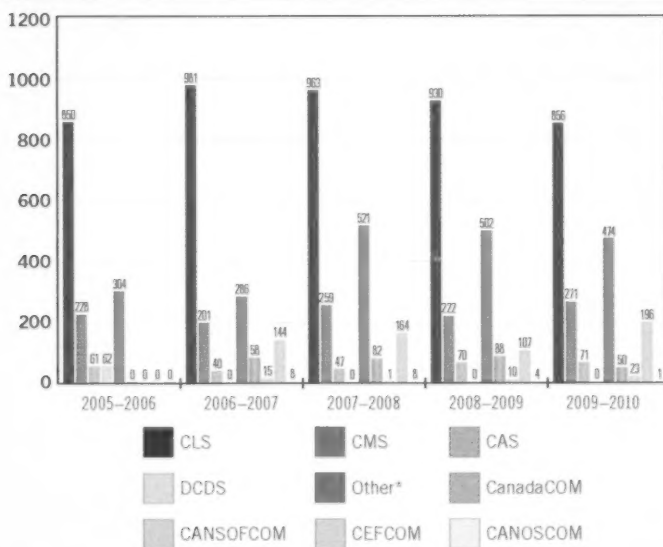
(2) For statistics relating to prior years, refer to previous JAG Annual Reports.

Summary Trials by Command

Command	2008-2009		2009-2010	
	#	%	#	%
Vice Chief of the Defence Staff (VCDS)	3	0.16	3	0.16
Canada Command (CanadaCOM)	88	4.55	50	2.58
Canada Operational Support Command (CANOSCOM)	4	0.21	1	0.05
Canada Special Operations Forces Command (CANSOFCOM)	10	0.52	23	1.18
Canada Expeditionary Force Command (CEFCOM)	107	5.54	196	10.09

Summary Trials by Command (continued)

Command	2008-2009		2009-2010	
	#	%	#	%
Chief of the Maritime Staff (CMS)	222	11.48	271	13.95
Chief of the Land Staff (CLS)	930	48.11	856	44.08
Chief of the Air Staff (CAS)	70	3.62	71	3.66
Chief Military Personnel (CMP)	491	25.40	469	24.15
Assistant Deputy Minister (Information Management) (ADM (IM))	7	0.36	0	0.00
Assistant Deputy Minister (Materiel) (ADM (Mat))	1	0.05	2	0.10
Total	1933	100	1942	100

**COMMAND
YEAR TO YEAR COMPARISON**

* Other includes — CMP; ADM (IM) & ADM (Mat), and VCDS

Summary Trials by Rank

	2008-2009		2009-2010	
	#	%	#	%
Private and Corporal (includes Master-Corporal*)	1713	89	1746	90
Sergeant to Chief Warrant Officer	65	3	71	4
Officer	155	8	125	6
Number of cases	1933	100	1942	100

* Master Corporal is not a rank. It is an appointment pursuant to QR&O article 3.08.

Findings by Charge

	2008-2009		2009-2010	
	#	%	#	%
Guilty	2198	90.98	2351	90.91
Guilty — Special Finding	2	0.08	3	0.12
Guilty of included charges	4	0.17	7	0.27
Not guilty	164	6.79	140	5.41
Charge stayed	46	1.90	76	2.94
Charge not proceeded with	2	0.08	9	0.35
Total	2416	100	2586	100

Summary of Charges

NDA Article	Description	2008-2009		2009-2010	
		#	%	#	%
83	Disobedience of lawful command	52	2.15	55	2.13
84	Striking or offering violence to a superior	2	0.08	3	0.12
85	Insubordinate behaviour	65	2.69	87	3.36
86	Quarrels and disturbances	41	1.70	64	2.47
87	Resisting or escaping from arrest or custody	0	0	4	0.15

Summary of Charges (continued)

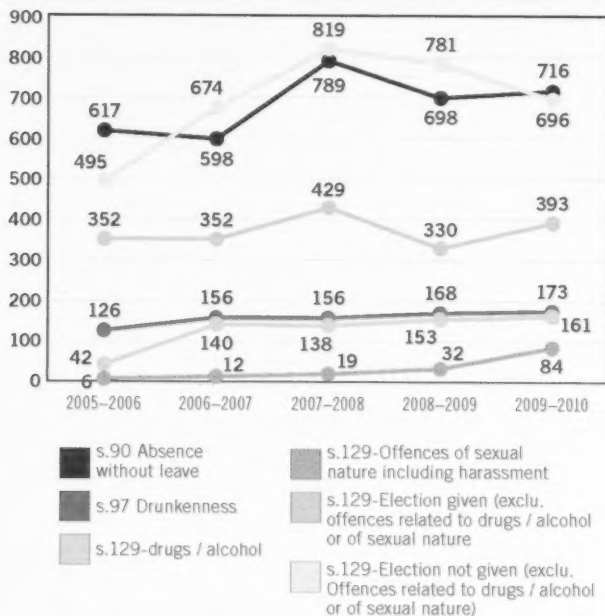
NDA Article	Description	2008-2009		2009-2010	
		#	%	#	%
90	Absence without leave	698	28.89	716	27.69
91	False statement in respect of leave	0	0	2	0.08
93	Cruel or disgraceful conduct	5	0.21	5	0.19
95	Abuse of subordinates	12	0.50	11	0.43
96	Making false accusations or statements or suppressing facts	0	0	1	0.04
97	Drunkenness	168	6.95	173	6.69
101	Escape from custody	2	0.08	0	0
101.1	Failure to comply with conditions	0	0	8	0.31
108	Signing inaccurate certificate	0	0	1	0.04
111	Improper driving of vehicles	4	0.17	4	0.15
112	Improper use of vehicles	10	0.41	12	0.46
114	Stealing	13	0.54	21	0.81
115	Receiving	1	0.04	2	0.08
116	Destruction, damage, loss or improper disposal	9	0.37	17	0.66
117	Miscellaneous offences	3	0.12	14	0.54
118	Contempt	1	0.04	0	0
124	Negligent performance of military duty	0	0	1	0.04
125	Offences in relation to documents	9	0.37	8	0.31

(continued)

Summary of Charges (continued)

NDA Article	Description	2008-2009		2009-2010	
		#	%	#	%
127	Injurious or destructive handling of dangerous substances	3	0.12	2	0.08
129	Conduct to the prejudice of good order and discipline — Offences of sexual nature including harassment	32	1.32	84	3.25
129	Conduct to the prejudice of good order and discipline — Drugs/Alcohol	153	6.33	161	6.23
129	Conduct to the prejudice of good order and discipline — election to be tried by CM given (excl. cases reported in 129 — Offences of sexual nature & 129 — Drugs/Alcohol)	330	13.66	393	15.20
129	Conduct to the prejudice of good order and discipline — election to be tried by CM not given (excl. cases reported in 129 — Offences of sexual nature & 129 — Drugs/Alcohol)	781	32.33	696	26.91
130	Service trial of civil offences	22	0.91	41	1.60
Number of charges		2416	100	2586	100

SUMMARY OF CHARGES YEAR TO YEAR COMPARISON



Authority

	2008-2009		2009-2010	
	#	%	#	%
Delegated Officer	1566	81	1566	81
Commanding Officer	282	15	299	15
Superior Commander	85	4	77	4
Total	1933	100	1942	100

Punishments

	2008-2009		2009-2010	
	#	%	#	%
Detention (suspended)	9	0.36	6	0.24
Detention	35	1.39	47	1.87
Reduction in rank	2	0.08	3	0.12
Severe reprimand	2	0.08	2	0.08
Reprimand	42	1.67	62	2.47
Fine	1480	58.85	1513	60.35
Confinement to ship or barracks	705	28.03	680	27.12
Extra work and drill	137	5.45	131	5.23
Stoppage of leave	43	1.71	22	0.88
Caution	60	2.39	41	1.64
Total	2515	100	2507	100

Note: More than one type of punishment may be awarded in a sentence.

Requests for Review

	2008-2009		2009-2010	
	#	%	#	%
Requests for review based on finding	15	47	18	47
Requests for review based on sentence	9	28	11	29
Requests for review based on finding & sentence	8	25	9	24
Total	32	100	38	100

Note: A CF member has the right to request a review of a summary trial finding or sentence to a higher authority in the Chain of Command.

Decisions of Review Authority

	2008-2009		2009-2010	
	#	%	#	%
Upholds decision	5	16	11	29
Quashes / substitutes findings	23	72	21	55
Substitutes punishment	3	9	4	11
Mitigates / commutes / remits punishment	1	3	2	5
Total	32	100	38	100

the 1990s, the number of people in the UK who are aged 65 and over has increased by 1.5 million, and the number of people aged 75 and over has increased by 1.1 million (Office for National Statistics 1999). The number of people aged 85 and over has increased by 0.5 million in the same period. The number of people aged 65 and over is projected to increase by 2.5 million by 2026, and the number of people aged 75 and over by 1.8 million (Office for National Statistics 1999).

There is a growing awareness of the need to develop strategies to meet the needs of the ageing population. The Department of Health (1999) has published a strategy for ageing, which sets out the government's commitment to improve the lives of older people. The strategy is based on three main principles: (1) to ensure that older people have the opportunity to live independently and actively; (2) to ensure that older people have access to the services and support they need; and (3) to ensure that older people are treated with respect and dignity. The strategy is being implemented through a range of measures, including: (1) improving the quality of care in residential care homes; (2) increasing the number of care workers; (3) improving the training of care workers; (4) increasing the number of care workers who are trained in dementia care; (5) increasing the number of care workers who are trained in mental health care; and (6) increasing the number of care workers who are trained in physical health care.

The Department of Health (1999) has also published a strategy for mental health, which sets out the government's commitment to improve the lives of people with mental health problems. The strategy is based on three main principles: (1) to ensure that people with mental health problems have the opportunity to live independently and actively; (2) to ensure that people with mental health problems have access to the services and support they need; and (3) to ensure that people with mental health problems are treated with respect and dignity. The strategy is being implemented through a range of measures, including: (1) improving the quality of care in mental health hospitals; (2) increasing the number of mental health workers; (3) improving the training of mental health workers; (4) increasing the number of mental health workers who are trained in dementia care; (5) increasing the number of mental health workers who are trained in mental health care; and (6) increasing the number of mental health workers who are trained in physical health care.

The Department of Health (1999) has also published a strategy for physical health, which sets out the government's commitment to improve the lives of people with physical health problems. The strategy is based on three main principles: (1) to ensure that people with physical health problems have the opportunity to live independently and actively; (2) to ensure that people with physical health problems have access to the services and support they need; and (3) to ensure that people with physical health problems are treated with respect and dignity. The strategy is being implemented through a range of measures, including: (1) improving the quality of care in physical health hospitals; (2) increasing the number of physical health workers; (3) improving the training of physical health workers; (4) increasing the number of physical health workers who are trained in dementia care; (5) increasing the number of physical health workers who are trained in physical health care; and (6) increasing the number of physical health workers who are trained in mental health care.

The Department of Health (1999) has also published a strategy for dementia, which sets out the government's commitment to improve the lives of people with dementia. The strategy is based on three main principles: (1) to ensure that people with dementia have the opportunity to live independently and actively; (2) to ensure that people with dementia have access to the services and support they need; and (3) to ensure that people with dementia are treated with respect and dignity. The strategy is being implemented through a range of measures, including: (1) improving the quality of care in dementia care homes; (2) increasing the number of dementia care workers; (3) improving the training of dementia care workers; (4) increasing the number of dementia care workers who are trained in dementia care; (5) increasing the number of dementia care workers who are trained in mental health care; and (6) increasing the number of dementia care workers who are trained in physical health care.

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ANNEX F

COURTS MARTIAL YEAR IN REVIEW — STATISTICS: 1 APRIL 2009 – 31 MARCH 2010

Courts Martial by Type

	2008-2009		2009-2010	
	#	%	#	%
Standing Court Martial	51	76	48	88
Disciplinary Court Martial**	10	15	0	0
General Court Martial	6	9	8	12
Total	67*	100	56	100

* This figure comprises 2 joint trials, which tried 4 accused.

** Bill C 60 came into force on 18 July 2008 reducing the types of courts martial from four to two. Therefore, the disciplinary and special courts martial were eliminated.

Summary of Charges

NDA Article	Description	2008-2009 #	2009-2010 #
75	Offences related to security	1	3
83	Disobedience of lawful command	13	8
84	Striking or offering violence to a superior officer	0	1
85	Insubordinate behaviour	1	1
86	Quarrels and disturbances	1	5
88	Desertion	0	1
90	Absent without leave	13	11
92	Scandalous conduct by officers	1	0
93	Cruel or disgraceful conduct	3	6
95	Abuse of subordinates	1	3
96	Making False Accusations or Statements or Suppressing facts	0	1
97	Drunkenness	3	10
101.1	Failure to comply with conditions	0	9
112 (a)	Unauthorized use of a CF vehicle	3	0

(continued)

Summary of Charges (continued)

NDA Article	Description	2008-2009 #	2009-2010 #
114	Stealing	4	10
115	Receiving	1	0
116	Destruction, damage, loss or improper disposal	3	5

Note: For statistics relating to prior years, refer to previous JAG Annual Reports.

NDA Article	Description	2008-2009 #	2009-2010 #
117(f)	An act of a fraudulent nature	8	8
118	Contempt of service tribunal	1	0
118.1	Failure to appear or attend	0	1
122	False answers or false information	2	0
124	Negligent performance of a military duty	12	5
125 (a)	Wilfully (or negligently) made a false entry	16	1
125 (c)	With intent to deceive, alters a document required for an official purpose	5	0
127	Negligent handling of dangerous substance	3	0
129	An act to the prejudice of good order and discipline	12	7
129	Conduct to the prejudice of good order and discipline	16	12
129	Neglect to the prejudice of good order and discipline	7	6
130 (4 (1) CDSA)*	Possession of substances	7	3
130 (5(1) CDSA)	Trafficking in substance	11	7
130 (5(2) CDSA)	Possession for purpose of trafficking	3	0
130 (80(d) CC) ***	Dangerous handling of explosive substance	1	0
130 (82 (1) CC)	Possession without lawful excuse of an explosive substance	1	1

(continued)

Summary of Charges (continued)

NDA Article	Description	2008-2009 #	2009-2010 #
130 (86(1) CC)	Careless use of a firearm	2	1
130 (121(1) (c) CC)	Fraud on government	0	2
130 (122 CC)	Breach of trust by public officer	3	0
130 (129 CC)	Offences relating to public or peace officer	1	0
130 (140 (1) CC)	Public mischief	0	1
130 (151 CC)	Sexual Interference	0	1
130 (153 CC)	Sexual exploitation	4	2
130 (163.1 (4) CC)	Possession of child pornography	0	1
130 (173) CC)	Indecent Acts	0	1
130 (220 (a) CC)	Criminal negligence where firearm is used	0	1
130 (236 CC)	Manslaughter	1	1
130 (249 (3) CC)	Dangerous operation causing bodily harm	0	1
130 (253 (a) CC)	Impaired driving	0	1
130 (264.1 CC)	Uttering threats	3	4
130 (264 (3) CC)	Criminal Harassment	0	1
130 (266 CC)	Assault	5	4
130 (267 (a) CC)	Assault with a weapon	1	1
130 (267 (b) CC)	Assault causing bodily harm	2	0
130 (270 (1) CC)	Assaulting a peace officer	0	1
130 (271 CC)	Sexual assault	3	12
130 (334 CC)	Punishment for theft — value stolen does not exceed \$5000	0	1
130 (362 (1)(a) CC)	False pretences	0	1

(continued)

Summary of Charges (continued)

NDA Article	Description	2008-2009 #	2009-2010 #
130 (367 CC)	Forgery	3	2
130 (368 CC)	Uttering a forged document	3	2
130 (380 (1) CC)	Fraud	1	2
130 (430 CC)	Mischief in relation to data	2	6
130 (733 (1) CC)	Failure to comply with probation order	0	5
Total Offences		187	181

* *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [CDSA].

** *Financial Administrative Act*, R.S.C., 1985, c. F-11 [FAA].

*** *Criminal Code*, R.S.C., 1985, c. C-46 [CC].

Disposition by Case

	2008-2009		2009-2010	
	#	%	#	%
Found/Plead Guilty to at least one charge	52	78	45	80
Not Guilty of all charges	9	13	11	20
Stay of Proceedings on all charges	1	1	0	0
Withdrawal of all charges at court martial	1	1	0	0
Other (Proceedings terminated)	4	6	0	0
Total	67	100	56	100

Sentences

Punishment Type	2008-2009	2009-2010
Dismissal	3	3
Imprisonment	7	10
Detention	2	4
Reduction in Rank	6	3
Forfeiture of Seniority	0	0
Severe Reprimand	16	11
Reprimand	15	11
Fine	40	33
Minor punishments: Caution 08-09, Confinement to ship 09-10	1	1
Total	90	76

Note: More than one type of punishment can be included in a sentence.

Language of Courts Martial

	2008-2009		2009-2010	
	#	%	#	%
English	53	79	46	82
French	14	21	10	18
Total	67	100	56	100

Courts Martial by Command

	2008-2009		2009-2010	
	#	%	#	%
Vice Chief of the Defence Staff (VCDS)	5	8	0	0
Assistant Deputy Minister (Information Management) (ADM (IM))	3	4	2	4
Assistant Deputy Minister (Finance and Corporate Services) (ADM (FIN CS))	0	0	0	0
Chief of the Maritime Staff (CMS)	11	16	11	19
Chief of the Land Staff (CLS)	32	48	32	57
Chief of the Air Staff (CAS)	6	9	6	11
Canadian Expeditionary Force Command (CEFCOM)	3	4	0	0
Canadian Operational Support Command (CANOSCOM)	0	0	1	2
Canadian Special Operations Forces Command (CANSOFCOM)	1	2	0	0
Chief of Military Personnel (CMP)	6	9	4	7
Total	67	100	56	100

Courts Martial by Rank

	2008-2009	2009-2010
Private and Corporal (includes Master-Corporal [*])	42	42
Sergeant to Chief Warrant Officer	12	9
Officer	13	5
Total	67	56

*Master Corporal is not a rank. It is an appointment pursuant to QR&O article 3.08.

ANNEX G

APPEALS REPORTING YEAR IN REVIEW — STATISTICS: 1 APRIL 2009 – 31 MARCH 2010

Decisions Rendered on Appeals

Court	2008-2009	2009-2010
Court Martial Appeal Court of Canada	9	8
Supreme Court of Canada	0	0*
Total	9	8

Note: * 2 cases were appealed to the Supreme Court of Canada, however, no decisions were made during this report period.

Appeals by Party

Status of Appellant	2008-2009	2009-2010
Appeals by Crown	2	0
Appeals by Offender	7	8
Total	9	8

Nature of Appeal

Grounds	2008-2009	2009-2010
Finding	3	4
Sentence (severity and/or legality)	2	1
Finding and sentence	3	2
Constitutional issue	1	0
Release pending appeal	0	1
Total	9	8

Disposition

Grounds	2008-2009	2009-2010
Upheld trial decision	3	4
Stay of Proceedings	2	0
Overtaken trial decision in whole or part	3	4
Total	1	8

Note: For statistics relating to prior years, refer to previous JAG Annual Reports.

GLOSSARY

OF TERMS AND ABBREVIATIONS

ADM (Fin CS)	Assistant Deputy Minister (Finance and Corporate Services)
ADM (IM)	Assistant Deputy Minister (Information Management)
ADM (Mat)	Assistant Deputy Minister (Materiel)
AJAG	Assistant Judge Advocate General
AMJC	Administration of Military Justice Committee
Canada COM	Canada Command
CANFORGEN	Canadian Forces General message
CANOSCOM	Canadian Operational Support Command
CANSOFCOM	Special Operations Forces Command
Capt	Captain
CAS	Chief of the Air Staff
CC	<i>Criminal Code</i>
CDS	Chief of the Defence Staff
CDSA	<i>Controlled Drugs and Substances Act</i>
CEFCOM	Canadian Expeditionary Force Command
CF	Canadian Forces
CFMLC	Canadian Forces Military Law Centre
CFNIS	Canadian Forces National Investigation Service
CFPM	Canadian Forces Provost Marshall

GLOSSARY OF TERMS AND ABBREVIATIONS

Charter	Charter of Rights and Freedoms
CJ CMAC	Martial Appeal Court of Canada
CLS	Chief of the Land Staff
CMA	Court Martial Administrator
CMAC	Court Martial Appeal Court of Canada
CMJ	Chief Military Judge
CMP	Chief of Military Personnel
CMPS	Canadian Military Prosecution Service
CMRS	Court Martial Reporting System
CMS	Chief of the Maritime Staff
CO	Commanding Officer
Cpl	Corporal
CP01	Chief Petty Officer 1 st Class
CSD	Code of Service Discipline
CWO	Chief Warrant Officer
DCS	Defence Counsel Services
DDCS	Director of Defence Counsel Services
DDMP	Deputy Director of Military Prosecutions
DIN	Defence Information Network
DI&OL	International Operational Law
DJA	Deputy Judge Advocate
DJAG	Deputy Judge Advocate General

DJAG/COS	Advocate General/Chief of Staff
DJAG/MJ&AL	Deputy Judge Advocate General/Military Justice and Administrative Law
DJAG/Ops	Deputy Judge Advocate General/Operations
DJAG/ Reg Svcs	Deputy Judge Advocate General/Regional Services
DLaw/ Admin Law	Directorate of Law/Administrative Law
DLaw/CBP&E	Directorate of Law/Compensation, Benefits, Pensions and Estates
DLaw/I&IO	Directorate of Law/Intelligence and Information Operations
DLaw/MIL PER	Directorate of Law/Military Personnel
DLaw/MJP&R	Directorate of Law/Military Justice Policy and Research
DMP	Director of Military Prosecutions
DND	Department of National Defence
DND/CF LA	Department of National Defence/ Canadian Forces Legal Advisor
EX-Cpl	Ex-Corporal
GCM	General Court Martial
JAG	Judge Advocate General
LOBT	Legal Officer Basic Training
LOIT	Legal Officer Intermediate Training
Mcpl	Master Corporal

GLOSSARY OF TERMS AND ABBREVIATIONS

MS	Master Seaman
MND	Minister of National Defence
NCM	Non-Commissioned Member
NDA	<i>National Defence Act</i>
NDHQ	National Defence Headquarters
Ocdt	Officer Cadet
OPME	Officer Professional Military Education
PO1	Petty Officer First Class
POCT	Presiding Officer Certification Training
PORT	Presiding Officer Re-certification Training
QR&O	Queen's Regulations and Orders for the Canadian Forces
RDP	Record of Disciplinary Proceedings
RMC	Royal Military College
RMP	Regional Military Prosecutor
SCC	Supreme Court of Canada
SCM	Standing Court Martial
Sgt	Sergeant
SOIRA	<i>Sex Offender Information Registration Act</i>
VCDS	Vice Chief of the Defence Staff